

Reasoned Opinion submitted by the House of Representatives of the Republic of Cyprus with regard to the Commission's proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM (2013) 534] – executive summary in English

Legal framework

In assessing the above mentioned EU proposal, the Standing Parliamentary Committee on Foreign and European Affairs (hereinafter "the Committee") took into consideration the legal framework provided by the Treaty of the European Union with regard to the principle of subsidiarity [article 5(3) of the Treaty regarding the subsidiarity principle, article 5 of Protocol (No2) on the application of the principles of subsidiarity and proportionality and article 12(b) on the role of national parliaments to ensure compliance with the principle of subsidiarity]. Furthermore, the Committee has made use of the guidelines on the application of the principles of subsidiarity and proportionality as provided in the Amsterdam and the Lisbon Treaty.

The proposal's objectives

As proposed by the European Commission (hereinafter "the Commission"), the draft Regulation provides for a "decentralised" prosecution office of the European Union with an exclusive competence for investigating, prosecuting and bringing to judgment offences against the EU budget. These offences are included in the draft "PIF Directive"¹ (PIF offences). For the purpose of investigation and prosecution conducted by the European Public Prosecutor's Office (EPPO), the territory of the Union's Member States shall be considered a "single legal area" in which the EPPO may exercise its competence. According to the proposal, this new body shall comprise the European Public Prosecutor, four Deputies and the Delegated European Prosecutors. The European Delegated Prosecutors (national prosecutors) shall carry out the investigation and prosecution in their Member State, using national staff and applying national law. However, their actions will be coordinated by the European Public Prosecutor, for purposes of coherence and efficiency. Under the proposal, the European Delegated Prosecutors may continue their functions as national prosecutors, but when acting under the mandate of the EPPO, they will be fully independent of their national prosecution authorities. When exercising its competence, the EPPO shall have the power to request or to order the investigative measures listed in Article 26 of the draft Regulation. Furthermore, the EPPO shall be vested with the

¹ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Brussels, 11.7.2012, COM (2012) 363.

authority to obtain information from the competent national authorities, Eurojust and Europol, shall have the same powers as national public prosecutors and shall decide which Member State's national Court of Law shall take each case before it.

The objectives of the proposed Regulation, as stated in the Commission's documents, namely the explanatory memorandum and the Impact Assessment², are the following:

- to contribute to the strengthening of the protection of the Union's financial interests and further development of an area of justice, and to enhance the trust of EU businesses and citizens in the Union's institutions, while respecting all fundamental rights enshrined in the Charter of Fundamental Rights of the European Union;
- to establish a coherent European system for the investigation and prosecution of offences affecting the Union's financial interests;
- to ensure a more efficient and effective investigation and prosecution of offences affecting the EU's financial interests;
- to increase the number of prosecutions, leading to more convictions and recovery of fraudulently obtained Union funds;
- to ensure close cooperation and effective information exchange between the European and national competent authorities;
- to enhance deterrence of committing offences affecting the Union's financial interests.

The legal basis for the draft Regulation is provided by Article 86 of the Treaty on the Functioning of the European Union.

Subsidiarity - the Committee findings

Following the examination of the proposal and performing the subsidiarity check as provided by the EU Treaty, the Committee concluded that the said proposal does *not* comply with the principle of subsidiarity, due to the following reasons:

- the necessity for an action at the EU level has not been sufficiently proven.
- the proposal goes beyond what is necessary in order to achieve the objectives of the Union, as stated in the next paragraph;

² SWD (2013) 274

Reasons

The Committee expressed doubts whether the proposed Regulation, in its current form, constitutes the best possible option to counter fraud and any other illegal activities affecting the financial interests of the Union while respecting the principles of subsidiarity and proportionality.

Seven different options to address the problem are included in the Commission's Impact Assessment. The European Commission concludes that "Option 4c", that is the proposed draft Regulation, is the best possible option to achieve the objectives stated above. However, the Commission itself, in Annex 4 of its Impact Assessment, titled "Cost-benefit analysis" (CBA), admits that *"this CBA is very much 'pushing the limits' of what is possible within a CBA"*, due to the fact that, inter alia, *"the data available is known to be seriously incomplete and subject to all sort of biases"*, and that *"the options leave a certain room for interpretation"*. Furthermore, it is stated that the decision on the location of the EPPO has not yet been taken, and as a result, it has not been possible to ascertain the concrete (administrative) integration possibilities and their associated costs and benefits. This, according to the Commission, *"would require further in-depth analysis"*. As a consequence, it is stated that key parts of the analysis are based on assumptions or scenario approaches.

Further to the above, the Commission also admits that an in-depth analysis would also be necessary with regard to the assessment of the performance of the Member States' judicial systems³, and that the data available is limited and based only on certain cases. However, in the same paragraph, it is concluded that a higher degree of performance of prosecution will be achieved through the proposal at hand.

Given the above, the Committee considered that the necessity for action at the EU level is neither substantiated by qualitative and quantitative indicators nor is it based on a detailed statement as required by Article 5 of Protocol (No2) of the Treaty, and therefore is not sufficiently proven. In this respect, the Committee stated that the principle according to which the decisions are taken as closely as possible to the EU citizens, requires that the necessity to apply quite the opposite, needs to be sufficiently justified by convincing evidence and should not be based on assumptions or on analysis leaving room for wrong conclusions.

The Committee expressed no doubt that the problem to be tackled by the proposed Regulation has trans-national aspects. However, the Commission considers that the "PIF Directive" will only

³ Pages 16-17 of the Impact Assessment.

partially address the problem in practice and, further, is of the opinion that enhancing existing measures is not enough. On the contrary, the Committee believes that the Commission should first wait to examine whether the draft directive is effective in practice, before it regulates the issue through a Regulation which is a stricter instrument. At this point, it is kindly noted that, in accordance with the principle of proportionality, the form of an EU action should not be too restrictive and, as far as possible, directives should be preferred to regulations. In this case, however, and contrary to the said principle, the Commission, without detailed justification, proposes a Regulation allowing the EPPO to have an exclusive competence for the investigation and the prosecution of the PIF offences and to restrict to a great extent the competence of Member States to take action under national law. Given that the EU proposal is not based on convincing evidence, the Committee concluded that the provisions contained in the draft Regulation go beyond what is strictly necessary to achieve the EU objectives.

The Committee also noticed that all other options included in the Commission's relevant accompanying documents, and in particular the option of enhancing existing structures to meet the Union's objectives, are not elaborated to the same extent as the proposed option. Considering this, together with the fact that the PIF directive is still not in force, and therefore precluding an accurate assessment of its effectiveness, the Committee concluded that not all possible alternatives were exhausted.

A question regarding the effective protection of the rights of suspects also arises, since the list of investigation measures provided in the draft Regulation⁴ includes measures that are not allowed under the national law of all member States. Therefore, the Committee does not agree with the Commission's opinion that the proposal at hand provides for the necessary level of protection, despite the safeguards provided.

The Committee is also of the opinion that Article 13 of the draft Regulation indirectly extends the scope of the proposed legislation, and therefore constitutes an unnecessary restriction of Member States' competence to take action contrary to the subsidiarity principle. The said article provides that in cases where the offences referred to in Article 12 are inextricably linked with criminal offences other than those referred to in Article 12 and their joint investigation and prosecution are in the interest of a good administration of justice the EPPO shall also be competent for those other criminal offences,

⁴ Article 26.

under the conditions that the offences referred to in Article 12 are preponderant and the other criminal offences are based on identical facts.

For the reasons stated above, the Committee finds that the proposal on the establishment of the European Public Prosecutor's Office is in breach of the subsidiarity principle, since it does not fulfill the criteria laid out in order to justify the necessity for a legislative action at the EU level.



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Further to the above, the Commission also admits that an in-depth analysis would also be necessary with regard to the assessment of the performance of the Member States' judicial systems³, and that the data available is limited and based only on certain cases. However, in the same paragraph, it is concluded that a higher degree of performance of prosecution will be achieved through the proposal at hand.

Given the above, the Committee considered that the necessity for action at the EU level is neither substantiated by qualitative and quantitative indicators nor is it based on a detailed statement as required by Article 5 of Protocol (No2) of the Treaty, and therefore is not sufficiently proven. In this respect, the Committee stated that the principle according to which the decisions are taken as closely as possible to the EU citizens, requires that the necessity to apply quite the opposite, needs to be sufficiently justified by convincing evidence and should not be based on assumptions or on analysis leaving room for wrong conclusions.

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The Committee also noticed that all other options included in the Commission's relevant accompanying documents, and in particular the option of enhancing existing structures to meet the Union's objectives, are not elaborated to the same extent as the proposed option. Considering this, together with the fact that the PIF directive is still not in force, and therefore precluding an accurate assessment of its effectiveness, the Committee concluded that not all possible alternatives were exhausted.

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The Committee is also of the opinion that Article 13 of the draft Regulation indirectly extends the scope of the proposed legislation, and therefore constitutes an unnecessary restriction of Member States' competence to take action contrary to the subsidiarity principle. The said article provides that in cases where the offences referred to in Article 12 are inextricably linked with criminal offences other than those referred to in Article 12 and their joint investigation and prosecution are in the interest of a good administration of justice the EPPO shall also be competent for those other criminal offences,

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For the reasons stated above, the Committee finds that the proposal on the establishment of the European Public Prosecutor's Office is in breach of the subsidiarity principle, since it does not fulfill the criteria laid out in order to justify the necessity for a legislative action at the EU level.

