



Parliament of Romania Chamber of Deputies

No. 1/4528/v8
27.12.2013

OPINION

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

Having regard to the Treaty of Lisbon and in particular Articles 5 and 12 of the TEU, and Protocols No. 1 and No. 2 annexed to the Treaty,

Having regard to The Constitution of Romania and in particular Article 148 thereof,

Having regard to the judgement of the Chamber of Deputies No. 11/2011,

Considering the draft opinion adopted by the Defence, Public Order and National Security Committee of the Chamber of Deputies in the session of 01.10.2013,

Taking into account the draft opinion adopted by the Committee for Human Rights, Cults and National Minorities Issues in the meeting of 22.10.2013,

Taking into account the final draft opinion adopted by the European Affairs Committee in the meeting of 11.12.2013,

Having regard to the consent of the Standing Bureau of the Chamber of Deputies on 16.12.2013,

The Chamber of Deputies, in accordance with Article 40 of Decision No. 11 of the Chamber of Deputies on 19.04.2011, has adopted this **opinion**:

The Chamber of Deputies

1. Notes that the novelty and subject matter of the provisions on the establishment of the European Public Prosecutor's Office under Article 86 of the Treaty on the Functioning of the European Union (TFEU) are linked to the Union's commitment under Article 2(2) of the Treaty on European Union (TEU) to offer its citizens an area of freedom, security and justice, and that this commitment is placed in the current architecture of the Union on the same level as other elements generally recognised as - essential for the Union, such as the internal market;

2. Notes that the establishment of the European Public Prosecutor's Office has already been provided for in Article 86(1) of the TFEU, and its right to investigate, prosecute and bring to judgement the authors and accomplices of crimes affecting financial interests, and to bring public action to the courts of the Member States in relation to these offences has already been provided for in Article 86(2) of the TFEU;

3. Notes the position of the European Parliament stated in the Resolution of October 23, 2013 [2013/2107 (INI)] and the Resolution of June 11, 2013 [2012/2117 (INI)], by strongly supporting the establishment of a European Public Prosecutor's Office, especially in combating, investigating, prosecuting and bringing to court offences that harm the financial interests of the Union and serious cross-border crimes, and the recommendation that the future European Public Prosecutor's Office shall have an efficient and flexible structure with functions coordinating and prompting national authorities to ensure a greater consistency of investigations by uniform rules of procedure;

4. Notes the positions stated in the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS) of the EU Council on the structure of the European Public Prosecutor's Office and its exclusive competence, where almost all of the 24 participating delegations welcomed the proposal, but notes that regarding the structure, a number of delegations were in favour of a collegiate structure of the Public Prosecutor's Office, and regarding competencies, some delegations supported an exclusive competence for the Public Prosecutor's Office while others were in favour of a competence shared with the Member States or argued that irrespective of the system of competencies, it shall need to be flexible and have many possibilities for exceptions;

5. Notes the findings and options outlined in the Conference "*10 Years of Eurojust. Operational Achievements and Future Challenges*", organised by Eurojust together with the Academy of European Law at The Hague on 12-13 November 2012, in particular:

- on the matter of establishing a European Public Prosecutor's Office from Eurojust, the option of the Public Prosecutor's Office's total independence from any political body, including the EU institutions, has been presented;

- affirming the principle of complementarity and applying the principle of opportunity in the sense that the European Public Prosecutor's Office should stimulate national investigations of fraud conducted by specialised units, and take over certain cases considered as representative, thus requiring the identification of priorities;

- affirming a model whereby the European Public Prosecutor's Office would work on the basis of a harmonised set of procedural rules called "model rules" covering a general part including procedural safeguards, measures to be adopted during the investigation phase, and rules for the prosecution and judicial phases of the case, with the risk, however, of difficulties caused by the simultaneous application of both these harmonised rules and the national rules of procedure.

6. Notes the position of the Defence, Public Order and National Security Committee of the Chamber of Deputies that decided that the draft regulation can be supported by Romania in the process of adoption;

The Committee reiterated its interest in transactions between the European Public Prosecutor's Office and the person suspected or accused of committing a crime affecting the financial interests of the EU, whereby the prosecution is terminated if the damage has been compensated and a lump-sum fine has been paid;

The Committee expressed its appreciation for strengthening the procedural rights of suspected persons subject to the investigations of the European Public Prosecutor's Office and for

strengthening the governance of the European Anti-Fraud Office (OLAF), its new role and the procedural guarantees within its investigations;

7. Notes the opinion of the Committee for Human Rights, Religious Affairs and National Minorities of the Chamber of Deputies, which considers that the document may be considered appropriate and realistic from the perspective of Romania, as it strengthens the procedural rights of suspected persons subject to investigations conducted by the European Public Prosecutor's Office, aims to strengthen the governance of the OLAF, and to strengthen the procedural guarantees in investigations;

8. Notes the preliminary position of the Romanian Government, which is, in principle, open to any proposal at EU level aimed at ensuring more effective measures to combat corruption in general and fraud related to EU funds in particular;

9. Notes the point of view of the Ministry of Justice to support the adoption of the Regulation, which aims to create for the first time an entity with sufficient powers and resources to investigate, prosecute and bring to trial persons accused of fraud or other illegal activities affecting the financial interests of the Union, both nationally and across borders;

10. Supports the establishment of the European Public Prosecutor's Office as "a body of the Union with a decentralised structure", legal personality and autonomous powers of investigation and prosecution, including the ability to carry out investigations in cross-border and complex cases;

11. Recognises that the European Union is best placed to protect its own financial interests and to ensure the prosecution of offences against these interests, but highlights possible destabilising risks derived from overlapping competencies and changing the national judicial systems;

12. Notes that the proposed regulation contains a number of provisions that remove much of the concerns about national sovereignty, to the extent that national authorities are assured of maintaining some basic competencies, namely:

- the material competence of the European Public Prosecutor's Office is limited to offences against the financial interests of the EU, although Article 86 of the TFEU would have permitted extending the measures to serious cross-border offences also;

- the applicable law is that of the Member State where the judgement is carried out;

- investigation and prosecution continues to be exercised by the authorities of the Member States;

- the acts of the European Public Prosecutor's Office may be challenged before national courts; if, during an investigation initiated by the European Public Prosecutor's Office, it is found that the act subject to investigation is an offence that does not fall within its competence, it shall refer the case to the national authorities;

- regarding the measures that can only be ordered by the European Public Prosecutor, which are not specified in the regulation, appropriate provisions must be included in the national law;

- judicial review remains at national court level for the courts to assess the fairness of the proceedings or the right to defence for the respective evidence, and shall also assess "freely" the respective pieces of evidence;

- applying the principle of decentralisation to ensure efficiency and reduce costs to a minimum, including by the use of European Delegated Prosecutors located in the Member States to carry out investigations and prosecutions, and the use of national authorities, in particular for the execution of coercive measures;

- the obligation of national courts to grant judicial authorisation for investigative measures with a coercive effect.

13. Considers that, as per the logic of regulation, it is natural that concerning the distribution of responsibilities, in the event of a conflict of duties, the European Prosecutor may decide to prioritise the investigation and prosecution functions of the European Public Prosecutor's Office, but notes that the possibility of giving priority to the investigation and prosecution of offences affecting the financial interests of the Union, together with the duty of loyal cooperation, which shall return to the authorities of Member States, depends in general on the resources available for investigation and prosecution, especially in Member States with low budgets;

14. Considers it acceptable that the European Public Prosecutor may choose the competent jurisdiction of trial, following a set of criteria considered as transparent, for example, the place of the offence, the place of the accused person's habitual residence, the place where the evidence are located, the place where the direct victims have their habitual residence;

15. Considers that participation in the selection for the position of the European Delegated Prosecutor should only be allowed for prosecutors who obtained this status under the national law;

16. Considers that concerning the rules of evidence it is acceptable for a court not to be able to reject as inadmissible the evidence presented by the European Public Prosecutor's Office on the ground that the rules and conditions of gathering that type of evidence are different under the national law applicable to it, and that it is natural not to allow the initiation another court procedure to validate those evidence, and that it is reasonable for courts to be able to judge the fairness of the proceedings or the right to defence in the application of the Charter of Fundamental Rights of the European Union for the respective evidence, and also for courts to be able to judge "freely" the respective pieces of evidence;

17. Notes the intention of the Romanian government to indicate to the EU Council the need for a thorough analysis of the draft regulation, mainly related to the structure, jurisdiction and functioning of the institution, the status of Prosecutors, the procedure for conducting investigations, the applicable law, the rules governing the admissibility of evidence, the competency of the national courts, the judicial review of the Prosecutor's acts and the recovery of legal expenses advanced by the Member States, and encourages the Romanian delegation to ask the EU Council to establish clear and objective criteria regarding the conduct of investigations, indictment and the execution of judgements, given the differences between the laws of Member States;

18. Notes and agrees with the observations of the Ministry of Justice on:

- the need to take appropriate measures to ensure the compatibility of the proposed regulation with the relevant national legislation;

- the need to provide sufficient guarantees for the selection procedures to allow access to prosecutors from all Member States for the positions of Deputy European Public Prosecutors and European Delegated Prosecutors, who, together with the European Public Prosecutor, shall adopt the internal rules of procedure of the European Public Prosecutor's Office;
- the need for the dismissal of European Delegated Prosecutors to be decided by a collegiate body on the proposal of the European Prosecutor, and not directly by the European Prosecutor in order not to affect their independence;
- the need to eliminate the hierarchical subordination of the European Delegated Prosecutors to the heads of internal prosecutors' offices, and the need to eliminate the possibility of instrumenting other cases nationwide, since the European Delegated Prosecutors who continue practising their duties in the national structures may affect their independence;
- the need to ensure for the European Public Prosecutor, his Deputies and the Delegated Prosecutors a status similar to that of the Magistrates of the Court of Justice of the European Union, as opposed to the status of the European Union staff;
- the need to establish clear rules on the career and accountability of the European Public Prosecutor, his Deputies and the Delegated Prosecutors, including the establishment of a recovery procedure for the damages caused to persons investigated or prosecuted unlawfully or abusively;
- the need to establish clearer rules for the judicial review of the acts of the European Public Prosecutor, especially in terms of non-indictment solutions;
- the need to supplement the provisions on procedural rules that shall be applied during the prosecutions in the investigations conducted by the central structure of the European Public Prosecutor's Office;
- the need to introduce provisions related to the recovery of legal expenses advanced by the Member States.

19. Considers concerning the judicial review that the regulation should clearly state the scope of judicial review, since, unless the regulation provides otherwise, the judicial review is to be carried out nationwide by assimilating the European Public Prosecutor's Office to a national authority, but in this case the Court of Justice of the European Union shall not be directly responsible concerning the acts under Article 263, 265 and 268 of the TFEU, since they shall not be considered as acts of a body of the Union in terms of judicial review, and the national courts will not be able to refer the case to the Court of Justice for a preliminary ruling on the validity of the acts of the European Public Prosecutor's Office under Article 267 of the TFEU; also, in the context of judicial review, it notes the increased uncertainty about the possibility of the Prosecutor's act being challenged when the European Public Prosecutor or the European Delegated Prosecutors may decide not to initiate an investigation by closing the file, or may order the cessation of prosecution when it becomes impossible, while according to the Romanian Criminal Procedure Code it is allowed to file a complaint to the Judge against the Prosecutor's decisions or orders not to indict;

20. Indicates in the context of opting for maximum harmonisation of the regulated issues that there is a risk of conflict between the proposed regulation and the proposal for a directive on the fight against fraud to the Union's financial interests by means of criminal law [COM (2012) 363],

which will lay down rules of substantive law with minimum harmonisation, and therefore the proposed regulation should be better aligned with the provisions of the proposed Directive;

21. Points out that the establishment of a European Public Prosecutor's Office without a related EU supranational court, maintaining the competence of national courts and the different national procedures of the Member States, may lead to partially losing the objective of consistent prosecution of these serious crimes;

22. Notes the European Commission's decision to maintain the proposal for the establishment of a European Public Prosecutor's Office, despite the reasoned opinions adopted by 14 chambers of the national parliaments, including the Chamber of Deputies of Romania, accounting for 18 of the total 56 votes;

23. Notes the opinion of the European Commission expressed in its communication of November 27, 2013 [COM (2013) 851] that the authors of the Treaty expressly provided for the establishment of the European Public Prosecutor's Office under Article 86 of the TFEU by including among its responsibilities the right to investigate, track and prosecute perpetrators of crimes affecting the financial interests of the Union, which strongly indicates that theoretically the establishment of the European Public Prosecutor's Office cannot be considered as inconsistent *per se* with the principle of subsidiarity, and what remains to be established in this regard is whether the individual action of the Member States is sufficient, and whether the added value of the proposed regulation is sufficient to justify the Union's regulation;

24. Notes the reference to the Court of Justice of the European Union in Case C-233/94, Germany / Parliament and the Council, ECR [1997] p. 1-2405), which admits that justifying compliance with the principle of subsidiarity can have an implicit and relatively limited form;

25. Notes the Commission's arguments and its reaffirmed opinion based on statistical data that the action to protect the financial interests of the Union at the Member States' level is not satisfactory;

26. Notes the European Commission's view that improving the current institutional system would have only marginal effects owing to the inherent limitations of the systems themselves; the powers of the OLAF are limited to administrative investigations, as the Office is not empowered to conduct criminal investigations or have access to such information, and its findings are only recommendations for the national authorities to start criminal investigations; the powers of Europol and Eurojust are limited to cooperating and coordinating actions without the competency to initiate and conduct criminal prosecutions and without the opportunity to receive such competencies as a result of the Treaties; the reform of Eurojust, which is already underway, may grant the agency powers to prosecute, but it cannot provide it with the capacity to act directly in the Member States;

27. Notes the arguments of the European Commission that cross-border admissibility of evidence, the identification of cross-border connections and the level of assistance provided by Member States can be achieved only through the proposed European Prosecutor's Office,;

28. Notes the arguments of the Commission on the added value of the proposal, i.e.:

- the differences between the criminal justice systems of the Member States may lead to "*forum shopping*" as long as the options for choosing a more favourable jurisdiction are available to offenders;

- the advantages of improving the efficiency of criminal proceedings when the concentration of powers in a unitary structure is obvious, especially as a result of the possibility of having an overview due to access to all information and documents of cross-border crimes; mutual assistance procedures would be replaced by operational practices;

29. Notes the European Commission's arguments that the preference of some Member States for a collegiate structure for the European Public Prosecutor's Office instead of the proposed organisational model would not bring performance improvements as it would be another organisational method and not a superior organisational method, to the extent that the collegiate structure, as a body of the Union, would not be less centralised, meaning that it would still take action at Union level; the collegiate structure would reduce efficiency and make decision-making more difficult; neither the Member States, nor the International Criminal Court use collegiate structures due to the need for rapid actions;

30. Recognises in principle the validity of the European Commission's arguments for maintaining the proposal on the establishment of the European Public Prosecutor's Office with the observations and recommendations made in this opinion.

This opinion is addressed to the Presidents of the European Parliament, of the Council and of the European Commission, and to the Romanian Government.

PRESIDENT

Valeriu Ștefan ZGONEA

