



HOUSE OF COMMONS

President of the European Commission
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

By email: SG-NATIONAL-PARLIAMENTS@ec.europa.eu

22 October 2013

Dear Mrs President,

EUROPEAN UNION DOCUMENT NO. 12558/13 AND ADDENDA 1 AND 2, A DRAFT REGULATION ON THE ESTABLISHMENT OF A EUROPEAN PUBLIC PROSECUTOR'S OFFICE

On 22 October 2013, the House of Commons of the United Kingdom Parliament resolved as follows:

That this House considers that the Draft Regulation on the establishment of a European Public Prosecutor's Office (EPPO) (European Union Document No. 12558/13 and Addenda 1 and 2) does not comply with the principle of subsidiarity, for the reasons set out in the annex to Chapter One of the Fifteenth Report of the European Scrutiny Committee (HC 83-xv); and, in accordance with Article 6 of Protocol (No. 2) annexed to the EU Treaties on the application of the principle of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

I enclose the relevant extract of the report.

Yours sincerely,
Robert Rogers



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)

Published by the Scottish Parliament on 4 September 2013

© Parliamentary copyright. Scottish Parliamentary Corporate Body
Information on the Scottish Parliament's copyright policy can be found on the website -
www.scottish.parliament.uk



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.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
Jenny Marra (Deputy Convener)
Alison McInnes
David McLeitchie
Graeme Pearson
Sandra White

Committee Clerking Team:

Clerk to the Committee

Irene Fleming

Senior Assistant Clerk

Joanne Clinton

Assistant Clerk

Ned Sharratt



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 "combating 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/SA_JusticeCommittee/General%20Documents/20130826_CSJ_EU_proposal.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/SA_JusticeCommittee/General%20Documents/20130902_CSJ_EU_proposal.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.

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/20130826_CSJ_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_CSJ_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.

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.

Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available in
under-14 held copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 349 5000
Telephone: 0800 692 7100
Email: sp.info@scottish.parliament.uk

ISBN 978-1-78351-587-2



1 European Public Prosecutor's Office

(a) (35214) 12551/13 COM(13) 532	Commission Communication on better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust
(b) (35217) 12558/13 COM(13) 534	Draft Regulation on the establishment of the European Public Prosecutor's Office (EPPO)
ADDs 1–2	Commission Staff Working Documents: Impact Assessment (IA) and Executive Summary of the IA

<i>Legal base</i>	(a) — (b) Article 86 TFEU; consent; unanimity
<i>Documents originated</i>	Both 17 July 2013
<i>Deposited in Parliament</i>	Both 22 July 2013
<i>Department</i>	Home Office
<i>Basis of consideration</i>	EM of 7 August 2013
<i>Previous Committee Report</i>	None; but see (34091) 12683/12: HC 86–xii (2012–13) chapter 10 (12 September 2013); (32831) 11055/11: HC 428–xxxviii (2010–12) chapter 1 (19 October 2011) and HC 428–xxxix (2010–12) chapter 1 (29 June 2011); (22999) —: HC 152–xxxiv(2001–02) chapter 14 (26 June 2002) and HC 152–xix (2001–02) chapter 5 (13 February 2002)
<i>Discussion in Council</i>	October JHA Council
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	(a) Not cleared; further information requested; relevant to the opt-in debate on document (b) and the Draft Regulation on Eurojust ¹ (b) Not cleared; recommended for debate on the Floor of the House on the opt-in together with the Draft Regulation on Eurojust; also recommended for a Floor of the House debate on the Reasoned Opinion before 28 October; further information requested

¹ (35216) 12566/13: Draft Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust), see chapter 3 of this Report.

Background

1.1 We have not previously scrutinised either document (a), the Commission Communication on setting up the European Public Prosecutor’s Office (EPPO) or document (b), the draft Regulation to establish the EPPO. Currently, prosecuting offences against the EU budget is within the exclusive competence of Member States and there is no existing EU authority for EU-level action. Against the background of levels of suspected fraud against the EU budget estimated by the Commission at around €500/£425 million in each of the three last years, both documents are aimed at achieving EU-level investigation and prosecution of crimes affecting the financial interests of the EU. They are part of a wider package of related measures, including the draft Directive on the fight against fraud to the Union’s financial interests by means of criminal law (known as the PIF Directive — PIF is the French acronym for protection of financial interests)² which we addressed in our last Report to the House. Document (b) is accompanied by the Commission’s impact assessment and an executive summary of the assessment.

1.2 In short, document (b) provides that the EPPO would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences against the Union’s financial interests. It would exercise the functions of prosecutor in the competent courts of the participating Member States in relation to offences against the EU’s financial interests. It also sets out the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and provides for judicial review of procedural measures taken by it in the performance of its functions. Document (a) provides the policy justification for document (b).

1.3 There is considerable history to the idea of an EPPO. In 2002 our predecessors scrutinised a 2001 Green Paper³ in which the idea of establishing an EPPO was first proposed by the Commission. However, the idea had been widely discussed before then, particularly at the Intergovernmental Conference for the Nice Treaty⁴ where the Commission presented an outline proposal, drawing on the work of *Corpus Juris*,⁵ but it was not taken up by the European Council due to lack of Member State support. During the Convention that produced the Draft Constitutional Treaty in 2003–04, the proposal was revived and included in the draft Treaty as Article III-175.⁶ It finally gained legislative footing in the Lisbon Treaty, now Article 86 of the Treaty on the Functioning of the Union (TFEU). The prospect of a specialist EU prosecution authority was raised again as part of a

2 (34091) 12683/12: HC 86–xii (2012–13) chapter 10 (12 September 2013).

3 See headnote: (22999) —: HC 152–xxxiv(2001–2) chapter 14 (26 June 2002), HC 152–xix (2001–2) chapter 5 (13 February 2002). Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor COM(2001) 715 final: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0715en01.pdf.

4 Commission Communication: additional Commission contribution to the Intergovernmental Conference on institutional reforms. The criminal protection of the Community’s financial interests: a European Prosecutor, COM(2000) 608 (see also COM(2000) 34): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0608:FIN:EN:PDF>.

5 *Corpus Juris* is a research report prepared by a group of academic lawyers from different Member States and published in 1997. See the Ninth Report of the House of Lords Select Committee on European Communities: Prosecuting fraud on the Communities’ finances — the *Corpus Juris* (1998–1999), HL 62: <http://www.publications.parliament.uk/pa/ld199899/ldselect/lddeucom/62/6201.htm>.

6 Draft Treaty establishing a Constitution for Europe, CONV 850/03M, 18 July 2003: <http://european-convention.eu.int/docs/treaty/cv00850.en03.pdf>.

range of initiatives considered by the Commission in the 2011 Communication which we scrutinised.⁷

1.4 In their Reports on the Green Paper,⁸ our predecessors said that an EPPO was unnecessary, particularly given the existence of Eurojust. They identified a number of concerns of principle, such as the combination of prosecution and investigative functions, the power of the EPPO to commit a person for trial and determine the location of the trial, the creation of differing standards of criminal responsibility for fraud depending on whether it related to fraud on the Community's financial interests or not, the lack of democratic accountability for the prosecution function, breach of the subsidiarity principle and dilution of Member State responsibility for prosecution of fraud. We echoed the concerns of our predecessors when, in recommending the 2011 Communication for debate in European Committee,⁹ we cautioned against the “inappropriate and unacceptable” use of national criminal justice systems in acting against crimes against EU finances.¹⁰

1.5 The EPPO proposal has been published alongside a separate legislative proposal to reform the EU Agency Eurojust¹¹ and a Communication on the reform of the European Anti-Fraud Office (OLAF);¹² these are the subject of separate Explanatory Memoranda and are examined in chapters 2 and 3 of this Report.

1.6 From a UK perspective, an important aspect of the background to the EPPO proposal is that the Coalition Agreement confirms that the Government will not participate in this proposal. In “The Coalition: our programme for Government”, the Government states in the chapter on Europe:

“We will approach forthcoming legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system. Britain will not participate in the establishment of any European Public Prosecutor.”¹³

1.7 Denmark¹⁴ will also not be participating in the measure and Ireland has yet to make its own JHA Title V opt-in decision. In this Report we therefore include, in our scrutiny, whether the interests of non-participating Member States are met by the proposal.

7 See headnote: (32831) 11055/11: HC 428–xxxviii (2010–12) chapter 1 (19 October 2011), HC 428–xxxi (2010–12) chapter 1 (29 June 2011). “Communication on the protection of financial interests of the EU by criminal law and by administrative investigations: An integrated policy to safeguard taxpayers' money”.

8 See headnote: (22999) —: HC 152–xix (2001–2) chapter 5 (13 February 2002).

9 <http://www.publications.parliament.uk/pa/cm201012/cmgeneral/euro/111025/111025s01.htm>

10 See note 2.

11 See note 1.

12 (35215) 12554/13: Commission Communication on improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office, see chapter 2 of this Report.

13 “The Coalition: our programme”, published 20 May 2010, Chapter 13, “Europe”, p.19.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.

14 See Recital 48 to document (a).

Legal Background

Legal base

1.8 The Union and Member States have a duty under Article 325 TFEU to “counter fraud and other illegal activities affecting the financial interests of the Union” and “to afford effective protection to those interests”.¹⁵ However, the legal base for the establishment of an EPPO is Article 86 TFEU.

1.9 Article 86 provides:

“1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.”

1.10 Article 86(1) also makes available an accelerated version of the enhanced co-operation procedure. In the absence of unanimity, nine Member States or more can request that the draft Regulation be referred to the European Council, which either comes to a consensus on the text, or after four months, is deemed to have granted authorisation to the nine to proceed with enhanced co-operation, so dispensing with the Council authorisation required under the normal enhanced co-operation procedure. The normal procedure set out in Article 20(2) of the Treaty on the European Union (TEU) and Article 329(1) TFEU then applies and the participating Member States need to agree unanimously to the proposal.

1.11 Article 86(2) then sets out the scope of the EPPO’s role: “investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union’s financial interests” including exercising “the functions of prosecutor in the competent courts of the Member States in relation to such offences.” Article 86(3) states that the Regulation establishing the EPPO shall also determine general rules applicable to the EPPO relating to the “performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.”

1.12 Finally, Article 86(4) provides for the possible extension of the scope of EPPO’s powers to include “serious crime having a cross-border dimension” but this can only be done by the unanimous vote of the European Council and with the consent of the European Parliament.

15 The Commission refers to the case of *Commission v Hellenic Republic Case 68/88 [1989] ECR 2965* as an example of where Article 325 obligations were enforced against a Member State for failing to take action to protect the EU’s financial interests: “By failing to institute criminal or disciplinary proceedings against the persons who took part in and helped conceal the transactions which made it possible to evade the above mentioned agricultural levies the Hellenic Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty”.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988CJ0068:EN:PDF>.

Opt-in

1.13 As the draft Regulation's legal base falls within Title V of Part Three of the TFEU, the UK's opt-in applies in accordance with Protocol 21 to the Treaties.¹⁶ The UK may choose, within three months of the proposal being presented to the Council (and in this case, the opt-in deadline is 20 November 2013), whether it wishes to participate in the measure. There is also provision in the Protocol for post-adoption opt-in. More importantly, given the UK's stated non-participation in the draft Regulation, Article 2 to the Protocol provides that even then: "no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States..." (i.e. the UK and Ireland).

1.14 The enhanced Parliamentary scrutiny of opt-in decisions,¹⁷ announced by Baroness Ashton in 2008, provides that the Government must indicate in an Explanatory Memorandum (within 10 days of the proposal's publication) its preliminary view on whether it will opt in. It should not reach a final view on the matter for eight weeks (the deadline here is 16 October) and should take account of any views expressed in that time by the Committee. Additionally, in 2011, the Minister for Europe (Mr David Lidington), committed, in the case of particularly strong Parliamentary interest in an opt-in decision, to offer a debate and vote in both Houses, on Government time, on the Government's recommended approach on the opt-in (known as Lidington debates).¹⁸

European Union Act 2011

1.15 The EPPO Regulation is "double-locked" in the European Union Act 2011 (the EU Act 2011) in that it is subject to two control mechanisms — it has to be approved both by referendum and by Act of Parliament according to section 6(3) of the Act.¹⁹ These requirements would be re-triggered should the provision in Article 86(4) TFEU for extension of the EPPO's powers to include "serious crimes with a cross border dimension" ever be exercised.

The Subsidiarity Protocol

1.16 The Subsidiarity Protocol applies to the draft EPPO Regulation.²⁰ Given the exclusion of the month of August from the calculation of the eight week period within which

16 Protocol (No. 21): On the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:en:HTML>.

17 <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/6/605.htm> and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206474/Final_opt-in_webpage_update.pdf.

18 <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110120/wmstext/110120m0001.htm#11012057000015>.

19 Section 6(3) states: "A Minister of the Crown may not give a notification under Article 4 of Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to TEU and TFEU which relates to participation by the United Kingdom in a European Public Prosecutor's Office or an extension of the powers of that Office unless—

(a) the notification has been approved by Act of Parliament, and
(b) the referendum condition is met".

See <http://www.legislation.gov.uk/ukpga/2011/12/section/6>.

20 See Article 3 for the definition of a "draft legislative act" within the meaning of Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality <http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01015001.htm>.

national parliaments may submit a Reasoned Opinion under Article 6, a Reasoned Opinion on the proposal would have to be submitted by the House of Commons before 28 October.

1.17 In order to satisfy the subsidiarity principle set out in Article 5(3) TEU, the Commission must first demonstrate that the objectives of the EPPO proposal cannot be sufficiently achieved at Member State level (the first limb of the test) and then, that the objectives of the proposal can be better achieved at EU-level by reason of their scale and effects (the second limb and so-called “EU added-value” test).²¹

1.18 Additionally, Article 5 of the Subsidiarity Protocol²² requires that the EPPO proposal must be accompanied by a detailed statement on its compliance with subsidiarity (and proportionality) principles and also assessing its financial impact. The reasons for concluding that the objectives of the EPPO proposal can be better achieved at EU level must also be “substantiated by qualitative and, wherever possible, quantitative indicators”.

1.19 The EPPO proposal must also comply with the principle of proportionality which requires, in Article 5(4) TEU, the “content and form of Union action” to “not exceed what is necessary to achieve the objectives of the Treaties”, but there is no scope for national parliaments to issue a Reasoned Opinion for breach of proportionality.

The current documents

Objectives of the EPPO proposal

1.20 The objectives of establishing an EPPO are summarised by the Commission in its impact assessment. The general or main objective 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;
- 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

21 Article 5(3) TEU: “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”.

22 Article 5 of Protocol No 2: “Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved”.

- ensure close cooperation and effective information exchange between the European and national competent authorities.²³

Reasons for EU action and compliance with subsidiarity

1.21 In its Communication and impact assessment the Commission says that the EPPO, as a new supra-national EU criminal justice body with investigative and prosecution powers, is needed because:

- additional measures are required to tackle fraud against the EU budget in the current financial crisis, having identified an average of €500/£425 million of suspected fraud in each of the last three years and that undetected fraud could be significantly higher (up to €3/£2.55 billion a year);²⁴
- there are deficiencies in the current national-level enforcement system²⁵ (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 cases forwarded by OLAF to national authorities do not result in any kind of enforcement or prosecution action;²⁶
- EU fraud is not a priority at national level and the outcomes of relevant prosecutions, such as conviction rates, are uneven across Member States²⁷ (varying across the EU from approximately 20% to 90%);²⁸
- there is limited scope to achieve the objectives of the proposal through reforming those EU Agencies: neither Eurojust²⁹ nor Europol³⁰ 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;³¹

23 See p.28 of the impact assessment.

24 See p.7 of the impact assessment.

25 See p.3 of the Communication, Heading 2: "The current system does not protect the Union's financial interests sufficiently".

26 See note 25, specifically para 2. The main reasons given are that Member States "are hampered by divergent legislation and uneven enforcement efforts ... the complexity of cases, the lack of sufficient national resources and the frequent need to gather evidence outside of the national territory".

27 See note 25, but p.4, para 2.

28 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 UK's percentage is one of the lowest: 23.1% but the 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".

29 See limits of Article 85 TFEU.

30 See limits of Article 88 TFEU.

31 Commission's impact assessment, p.26.

- other current measures and initiatives taken by the Commission are not sufficient to deal with the problems identified with investigations and prosecutions;³²
- a coherent, EU-level prosecution regime is justified and necessary considering the cross-border elements involved in EU fraud cases, to produce a consistent, efficient, equivalent level of enforcement throughout the EU, to ensure cooperation and coordination between Member States and to systemically pursue every suspected offence against the EU's financial interest, to improve deterrence;³³
- an EU-level approach will also 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; and
- 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 prosecutions.

1.22 The Commission says in its impact assessment that these reasons demonstrate a “clear need for EU action” to protect the EU's financial interests. This meets the “traditional subsidiarity test” which “requires a demonstration that the proposed measure's objective may be better achieved at Union level than at the level of individual Member States”. They demonstrate:

“how the main objective, i.e. effectively protecting the Union's financial interests and “countering fraud and other illegal activities” affecting such interests, has been met thus far, particularly taking into account the results of efforts by Member States and the reasons for any shortcomings.”³⁴

1.23 In other words, the Commission believes that reasons for action listed in paragraph 1.21 demonstrate that not only will the establishment of the EPPO: “enhance criminal prosecutions related to EU fraud and other illegal activities affecting the Union's financial interests by introducing a direct European enforcement regime, to be implemented and coordinated by a European prosecution office” but also that “criminal prosecutions conducted by national authorities do not and cannot achieve the results expected from such a Union-level enforcement regime.”

1.24 However, in its explanatory memorandum prefacing the draft Regulation, the Commission asserts the proposal's compliance with subsidiarity by reference to a different main objective:

“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 is required both from the Union and the Member States by Articles 310(6) and 325 TFEU. In accordance with the subsidiarity principle, this

32 Commission's impact assessment, p.27.

33 See both p.6 of the Communication and p.26 of the impact assessment.

34 Quotations from p.26 of the impact assessment.

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.”³⁵

1.25 The subsidiarity justification provided at Recital 5 of the draft Regulation refers to the same objective:

“(5) Since the objectives of this Regulation, namely the setting up of the European Public Prosecutor's Office, cannot be achieved by the Member States given the fragmentation of national prosecutions in the area of offences committed against the Union's financial interests and can therefore, by reason of the fact that the European Public Prosecutor's Office is to have exclusive competence to prosecute such offences, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union.”

Overview of document (b)

Structure and operation of the EPPO

1.26 The draft Regulation provides for the EPPO to be structured on a “decentralised” model (Recital 13 and Article 3) with the following features:

- a small central team of the EPPO would be created (comprising 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 (Article 6 (1) and (4));
- the central EPPO team would be able to direct the competent investigative and prosecution authorities within the participating Member States through the EDP network for the offences within its competence (Article 6(4));
- EDPs would be “double-hatted” and be able to act under the auspices of both the EPPO for offences within the EPPO's competence and have national level roles (Article 6(6));
- the EPPO would be integrated into the national criminal justice systems of the participating Member States through the EDPs —the Commission views the EDPs as the best way to deliver the “assimilation principle” i.e. that acts of the EPPO are considered to be national acts of investigation which respect national laws (Recital 16);
- when the EDP acts within the EPPO mandate, the draft Regulation provides that they shall be fully independent from the national prosecution bodies so that they cannot act as EDPs and as national prosecutors at the same time (Article 6(5)); and
- where there are conflicting EPPO and national assignments, the draft Regulation requires EDPs to give priority to their EPPO functions (Article 6(6)).

35 Para 3.2, p.4 of the explanatory memorandum.

Appointments and dismissals

1.27 Articles 8 and 9 provide that the EPP and the four Deputies will be appointed:

- by the Council, acting by simple majority, with the consent of the European Parliament for a term of eight years, which will not be renewable;
- from persons whose independence is beyond doubt and who possess the qualifications required for appointment to high judicial office and relevant prosecutorial experience, based on an open call for candidates;
- from a shortlist³⁶ drawn up by the Commission on the opinion of a panel, composed of seven persons chosen from among former members of the Court of Justice (ECJ), members of national supreme courts, national public prosecution services and/or lawyers of recognised competence, one of whom shall be proposed by the European Parliament, as well as the President of Eurojust as an observer; and
- subject to the power of the ECJ, on application by the European Parliament, the Council, or the Commission, to dismiss them.

1.28 The EDPs follow a different system in certain respects as set out in Article 10:

- each Member State shall forward a list of at least three candidates to the EPP;
- the candidate selected, whose independence must be beyond doubt, must also demonstrate the qualifications required for appointment to high judicial office and relevant prosecutorial experience;
- Member States will then appoint the selected EDP as a prosecutor under national law, if at the time of his/her appointment as an EDP, he/she did not have this status already;
- the appointment is for a renewable term of five years; and
- EDPs may be dismissed by the EPP but shall not be dismissed as national prosecutors by the competent national authorities without the consent of the EPPO.

Legal status, jurisdiction and competence

1.29 The draft Regulation states that “for the purposes of investigations and prosecutions conducted by the European Public Prosecutor, the territory of the Union’s Member States shall be considered a single legal area in which the European Public Prosecutor’s Office may exercise its competence” (Article 25(1)).

1.30 The Commission proposes that:

³⁶ Additionally, in the case of the Deputies, the shortlist must take into account demographic balance and the geographical range of the Member States.

- the EPPO would have exclusive competence to investigate and prosecute “criminal offences affecting the financial interests of the Union” which are known as “PIF offences”³⁷ (Article 11(4));
- these offences will be defined by reference to the yet to be agreed proposal for the PIF Directive³⁸ (Article 12);
- the EPPO’s investigations and prosecutions are only governed by national law (where the prosecution is conducted) to the extent they are not covered by the Regulation and where covered by both, the Regulation will prevail (Article 11(3));
- national authorities in participating Member States, EDPs and all institutions, bodies, office and agencies would be obliged to report all suspicions regarding PIF offences to the EPPO (as it would have exclusive competence) (Article 15 (1) and (2));
- the EPPO may collect or receive information from any person on conduct which might constitute a PIF offence (Article 15(3)); and
- where a PIF offence is inextricably linked with others and joint investigation and prosecution are in the interests of a good administration of justice, the EPPO would also be competent for the related offences as well as the PIF offence, but only if the PIF offences are ‘preponderant’ and the other offences are based on identical facts. If not, the EPP may decide that a participating Member State will be deemed competent (Article 13).

Investigative powers

1.31 In respect of participating Member States, the draft Regulation grants the EPPO the use of a wide range of investigative powers and measures. It states that:

- Member States shall ensure that an extensive list of investigative measures are available for use by the EPPO, such as search and seizure powers, obtaining data, sealing premises, freezing property and evidence, interception, surveillance, monitoring financial transactions and summoning witnesses (Article 26);
- such measures will be subject to conditions (such as obtaining prior judicial authorisation or the pre-requisite of “reasonable grounds” (Article 26(3)) provided for both in the EPPO Regulation itself *and* national law i.e. within the same legal frameworks that are currently available for domestic law enforcers and prosecutors (Article 26(3) and(4));
- the EPPO would be able to obtain any relevant information from national criminal investigation or law enforcement databases and registers of public authorities in participating Member States and access this information through the EDPs too (Article 20);

³⁷ See note 2 for reference to “PIF”.

³⁸ See note 2.

- the EPPO would be able to obtain any relevant information from Eurojust and Europol and the institutions, bodies, offices and agencies of the Union and Member State authorities shall provide the necessary assistance and information to the EPPO upon its request (Article 21); and
- national authorities would be required to take any actions necessary and comply with the instruction of the EPP, its deputies and EDPs, and execute the investigative measures assigned to them by the EDP (Article 18(1)).³⁹

Prosecution powers

1.32 The Commission proposes that the EPPO should:

- have the same powers as national public prosecutors in national courts in participating Member States, including evidence gathering, deciding whether to charge the individual and taking the plea (Article 27(1));
- choose which participating Member States' national court would take the case, based on a number of factors outlined in the Regulation, such as where the crime was committed and the habitual residence of suspects, witnesses and victims (Article 27(4));
- have dismissal decision powers (Article 28), including the right to dismiss through transaction (Article 29) i.e. the EPPO may decide to dismiss the case if the suspected person pays a lump-sum fine and compensation to the Union through the EPPO (not the Member State). If the national court's final ruling is confiscation, the monetary value of those confiscated assets will also go to the Union's budget (Article 31); and
- have the power to request the lifting of immunity, whether at national or at Union-level (in accordance with applicable rules) in order to kick-start stalled investigations (Article 19).

Procedural safeguards

1.33 The EPPO's use of investigative powers in the Member States would have to respect the EU Charter of Fundamental Rights including the right to a fair trial and the rights of defence. The draft Regulation:

- provides that any suspect and accused person involved in the proceedings of the EPPO's office should have, as a minimum, certain rights, in accordance with national law (Article 32);
- makes references to EU Directives on the right to interpretation and translation; the right to information and access to case materials; and access to a lawyer (Article 32(2)(a)–(c)); and

³⁹ Article 18 (1) states: "The designated European Delegated Prosecutor may either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located".

- defines other rights which have not yet been regulated by the EU: the right to remain silent; the right to be presumed innocent; the right to legal aid; and the right to present evidence (Article 32(2)(d)-(f) and Articles 33, 34 and 35).

Judicial Review

1.34 The EPPO's decisions would be subject to judicial review in national courts (Article 36). The Commission says that this treatment of the EPPO as a national authority for these purposes will ensure the application of the "assimilation principle". There will only be recourse to the ECJ on questions of interpretation from national courts,⁴⁰ dismissal of the EPP and EDP (Articles 8.4 and 9.4) and jurisdiction on disputes over compensation for damages (Article 69). No judicial review would be possible on any EPPO decision to dismiss a case through transaction (Article 29(4)).

Data Protection

1.35 The EPPO would need to process information from a wide variety of sources and create a Case Management System (drawing on Eurojust's IT infrastructure) which would partly contain personal data. With respect to the need to safeguard that data, the draft Regulation (Chapter VI) provides that:

- the EPPO should appoint a Data Protection Officer (DPO) to ensure that a written record of the transfer of personal data is kept, to cooperate with EPPO staff responsible for procedures, training and advice on data processing and to prepare annual reports (Article 41);
- the European Data Protection Supervisor (EDPS) would also work in close cooperation with the national data protection authorities as regards the processing of data by the EPPO (Article 45);
- data subjects would have the right to access and rectify personal data and also to lodge a complaint with the EDPS (Articles 42, 43 and 46);
- the EPPO would be liable for any unauthorised or incorrect processing (Article 47);
- the EPPO will be able to directly exchange:
 - all non-personal data with EU bodies or agencies, the competent authorities of third countries, international organisations or Interpol in the performance of its tasks (Article 56(2));
 - but personal data only with Eurojust, Europol, Union bodies or agencies (Article 60) unless certain conditions are met by third countries, international organisations or Interpol (Article 61(1) and (2));
- the EPPO may also receive and process personal data from all these entities in the performance of its tasks (Article 56(3)); and

40 See para 3.3.5, p.7 of the explanatory memorandum.

- Regulation 45/2001 on data protection by EU institutions will apply to the EPPO (Article 37(5)), though the Commission intends the proposal to also be compliant with current data protection proposals (Recital 43).

Co-operation with Eurojust, OLAF and other agencies and organisations

1.36 Article 86(1) TFEU describes the EPPO being established “from” Eurojust. The Commission considers that this means that “operational, administrative and management links” (Article 57(1)) between them are needed as follows:

- the ability of the EPPO to request Eurojust or its competent national members to participate in the coordination of, or to use powers attributed to them by EU legislation or national law for, specific acts of investigation that that may fall outside the EPPO’s scope of competence and/or to support the transmission of EPPO decisions or requests for Mutual Legal Assistance (Article 57(2)(b),(d) and (f));
- a role for Eurojust in “facilitating agreement” between the EPPO and participating Member States over competence on ancillary offences — i.e. those connected to PIF offences (Article 57(2)(c));
- use by the EPPO of elements of Eurojust infrastructure, such as its technical support in preparing EPPO budgets, human resources and IT system (Article 57(6));
- exchanging information, including personal data between the two bodies (Article 56(2)(a));
- automatic cross-checking of data held by Eurojust and the EPPO on a shared Eurojust Information Technology (IT) platform known as the Case Management System (Article 56(3)); and
- developing a special relationship with Europol, with a focus on the exchange of information including personal data (specifically Article 58(2)), cooperating with the Commission and OLAF on the wider fight against fraud, and entering into cooperative relations with other EU institutions, bodies, offices and agencies (Article 58).

Third party co-operation

1.37 The draft Regulation proposes that:

- participating Member States would be required to recognise the EPPO as a competent authority for the purpose of implementing international agreements on legal assistance in criminal matters and extradition (Article 59(4)) and where necessary alter those international agreements to ensure the EPPO can rely on such agreements if the EPPO is currently excluded (Article 59(4)); and
- the EPPO may also establish agreements in its own right with competent authorities of third countries and international organisations (Article 59(3)).

Accountability

1.38 It is proposed that the EPPO should have general accountability to the EU Institutions, produce annual reports (both for the institutions and national parliaments, Article 70) and other documents (annual and multiannual programmes, an anti-fraud strategy, conflicts of interest rules, staffing rules, and rules governing handling of compensation and fines monies), be audited by the Court of Auditors (ECA) (Article 66) and susceptible to actions for damages (for non-contractual liability, Article 69) before the ECJ. An annual appearance of the EPP before the European Parliament is also envisaged and national parliaments may also invite the EPP or EDPs to “participate in an exchange of views in relation to the general activities of the EPPO” (Article 70).

The Government’s view

1.39 In an Explanatory Memorandum of 7 August, the Minister of State for Immigration at the Home Office (Mark Harper) says that the Government does not support the proposal:

“Whilst the Government considers the protection of the EU’s financial interests to be important, we do not believe that the creation of a supra-national prosecutor in the form of an EPPO is either necessary or proportionate.”

1.40 He makes a general point about the approach of the draft Regulation. Referring to the non-participation of the UK and Denmark in the measure, he says that despite this the EPPO proposal is drafted (and its benefits assessed) by the Commission in a way that ignores this:

“There is only one passing reference to Member States that are not participating in the EPPO, in Article 57(2)(f), which concerns the relationship between Eurojust and the EPPO.”

1.41 The lack of provision for non-participating States, is, says the Minister, “a critical issue for the UK”. He says that the Government will seek clarity in negotiations on the lack of provision for non-participating Member and “protect our position in line with our rights under Protocol 21 where we do not opt in to a JHA measure”. The points to be raised in negotiation are set out in paragraph 2.52 below.

Legal Base

1.42 The Minister says that given Article 86 TFEU limits the EPPO’s remit to crimes against the EU’s financial interests:

“The Government will also want to question whether it is within the Commission’s competence to propose that the EPPO can request Eurojust or its national members to use its powers to investigate acts that fall *outside* the EPPO’s scope of competence (Article 57(2) of the EPPO draft Regulation)”.

1.43 The Minister also questions the EU’s competence under Article 86 to regulate the criminal procedural rights of individuals as that competence only resides in Article 82(2)

TFEU and is subject to the ordinary legislative procedure.⁴¹ He wants to know how such regulation “would impact on any future criminal procedural rights measures which the Commission might bring forward under Article 82(2)”.

Subsidiarity

1.44 With reference to the Commission’s subsidiarity argument in its explanatory memorandum (paragraph 1.24),⁴² the Minister is clear that the draft Regulation does not comply with the principle of subsidiarity. He says that:

“We do not believe that the principle of subsidiarity has been met. The Commission has jumped from the options of taking no action or taking no new regulatory actions to variations on the creation of an EPPO. The Commission does not in our view 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.

“The Commission has based 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. We take the view that prevention at source within Member States is as valid a deterrent within the enforcement cycle and a more cost effective one. The Commission does not explore or assess alternative approaches to deliver a strengthened system to prevent EU fraud at source at national level. These might include further simplification of rules that govern the different sectors of the EU budget to make it easier to apply and difficult to defraud, for Member States to take full responsibility for funds that they administer, or effective enforcement by the Commission to force Member States to improve their management and control systems.”

1.45 Turning to the Commission’s claim that EU-level action is justified from a financial point of view, the Minister adds:

“The Impact Assessment has consistently included OLAF figures, which include data and information from Denmark and the UK. In our view, the Commission’s assessment, calculations of risk and therefore its projection of the scale of the problem do not appear to take account of the fact that at least Denmark and the UK will not participate.

“The Commission also includes VAT fraud and customs duties (including subsidised tobacco and cigarette smuggling) in its list of Union finances and as a component of EU fraud. It identifies these as the main risk for offences which fall within the EPPO’s remit based on PIF offences and also as the significant proportion of total EU fraud. The Commission’s assessments and examples therefore include these revenue incomes and actual and projected figures for such offences. However, Member States, including the UK, have consistently asserted during the negotiation of the PIF

41 Note Article 82(2) also stipulates the use of Directives.

42 See note 35: Para 3.2, p.4 of the explanatory memorandum.

Directive that VAT fraud (and potentially customs duties) is within national competence and are not EU fraud. If excluded as PIF offences, noting that the negotiation on the PIF Directive has yet to be concluded to confirm this exclusion, then the Commission’s justification for an EPPO response is fundamentally flawed.”

Opt-in and Coalition Agreement

1.46 The Minister notes the three month deadline for opting in but says: “In practice, however, the Government has confirmed in the Coalition Agreement that it will not opt in.” He says that the Government has offered a Lidington debate on the “parallel opt-in decision triggered by the new Eurojust proposal” which it would expect “to include reference to the EPPO proposal”.

EU Act 2011

1.47 Noting the requirements that we have outlined in paragraph 1.15 above, the Minister says that should the EU Act requirements be satisfied by any future Government “this would also require profound changes to UK law”.

Main policy implications

The Commission’s approach

1.48 The Minister says that the Government does not agree with the Commission’s approach because:

- the creation of an EPPO is not the appropriate response to tackling EU fraud;
- for participating Member States, the proposal will transfer responsibility for tackling fraud against the EU budget away from national-level decision making to a supra-national authority, whose EDPs have to prioritise EU fraud above other crime at a national level;
- it is a flawed approach for Member States not to be able to determine their national priorities, and consequent use of resources, in tackling crime;
- the EPPO would disrupt the current system for tackling fraud against the EU budget at a time where the Commission has reported two consecutive years of decrease in fraudulent and other irregularities affecting the EU budget and their estimated financial impact;⁴³
- the proposed EPPO system would result in a duplication of established national level efforts (including specific bodies) to protect Member State and EU financial interests, including organised crime;

43 See the 2010 and 2011 Annual Reports on *Protection of the European Union’s financial interests — Fight against fraud*: http://ec.europa.eu/anti_fraud/documents/reports-commission/2010_en.pdf and http://ec.europa.eu/anti_fraud/documents/reports-commission/2011/report_en.pdf.

- the best way to tackle fraud is through prevention (as reflected by the UK’s own “zero tolerance” approach to all fraud which it takes “extremely seriously” and which results in low levels of fraud), using robust management controls and payment systems and requiring all agencies with responsibility for distributing EU funds to have processes in place to monitor and report fraud; and
- it would cause a shift from prevention to reaction (after crimes have been committed) as it would make each Member State less responsible for anti-fraud work at national level (as it would remove competence for PIF offences from them), “slowing down progress whilst creating limited value”.

Preferred approach of improving existing mechanisms

1.49 The Minister says, that instead, the EU’s current focus should be:

“on effective implementation of the existing mechanisms to bring procedures to combat such crimes fully into use; not on the creation of an additional EU body. From both a UK and an EU-wide perspective, the Government believes that the creation of an EPPO is unnecessary and flawed.”

1.50 So, in view of this, the Minister says that the Government dismisses “wholesale disruptive reform” and the Commission’s “criminal justice response” in favour of an approach based on improving existing mechanisms. It says that:

- even in the case of a major EU fraud, existing bodies, such as OLAF, should gather and supply evidence to Member States’ national authorities within existing and strengthened mechanisms;
- there should be renewed focus on improving the efficiency of OLAF’s key role and successes in preventing fraud, including its increasing engagement with Member States;⁴⁴ and
- overall, there should be improved:
 - oversight by the Commission of EU implementation and data-gathering procedures;
 - engagement with Member States alongside OLAF to prevent fraud;
 - commitment to simplify EU funding systems and regulations making “...fraud harder to commit in the first place”.

Future extension of EPPO proposal to other serious cross-border crimes

1.51 Although the Commission has not sought to apply the EPPO’s competence to other serious cross border crimes under the terms of Article 86(4) TFEU (requiring unanimity in the European Council), the Government notes that Article 74 of the proposal allows the Commission to report on the feasibility and advisability of extending the competence of

44 See 2012 OLAF report: http://ec.europa.eu/anti_fraud/documents/reports-olaf/2012/olaf_report_2012_en.pdf

the EPPO to other criminal offences and to submit legislative proposals on this matter. The Minister says that Government would not support such a proposal.

Areas of negotiating concern, including relationships with Eurojust, OLAF and Europol

1.52 The UK will seek more provision for non-participating Member States in the Regulation as well as other matters during its negotiation. The Government's list of concerns includes:

- ensuring respect under the Treaties for non-participating Member States' legal systems, including the protections in Protocol 21 where the UK has not opted in;
- how the Commission views the EPPO interacting with non-participating Member States;
- how authorities in non-participating Member States will interact with authorities from participating Member States where the EDPs are acting under the auspices of the EPPO;
- ensuring a clear distinction between the EPPO role and the national role;
- the implications for existing and future cross-border investigations which include the UK, especially where they involve interception capabilities;
- the loss of Member State autonomy to choose how to use their own resources to tackle serious crime;
- the full implications of the creation of an EPPO on other EU Agencies, such as OLAF, Eurojust and Europol, including the effect of Article 57(2) in respect of Member States participating in Eurojust, but not in the EPPO;
- the legal and operational implications of the Commission's proposal for the EPPO to have "ancillary competence" for offences beyond "PIF offences";
- the scope of jurisdiction in respect of citizens and businesses of non-participating Member States based in the territory of a participating Member State;
- the full implications for data protection of the EPPO proposal, especially concerning data exchange between the EPPO and other EU Agencies and third countries and draft data protection proposals currently under negotiation;
- the power of the EPPO to determine the location of a prosecution (based on criteria), which may raise concerns about so called forum shopping i.e. selecting a court system that is likely to be most favourable to a conviction;
- the Commission's use of term "single legal territory" in relation to the EPPO's powers to operate with sole competence for "PIF offences" given that this is "a new term which raises serious concerns for the future direction of criminal law at EU level" which the Government intends to challenge;

- the EU’s purported competence to propose criminal procedural rights regulations under Article 86;
- whether the proposed EPPO model does indeed deliver the assimilation principle;
- the European Ombudsman being the only recourse for a participating Member State to challenge an EPPO decision to drop a case because the suspect has paid monies to the EPPO and Union;
- the implications for the UK and international relations of the Commission proposals around the EPPO negotiating Third Country Agreements and making use of the existing bilateral agreements of participating Member States;
- whether the amendment of Third Country agreements proposed by the Commission is a compulsory unilateral amendment of all existing and relevant criminal justice bilateral agreements as this would “set a worrying precedent which could undermine individual Member States’ diplomatic relationships with Third Countries”;
- the implications for the interaction between EPPO and Eurojust (given the UK has yet to make its separate opt-in decision on the proposal reforming the latter), as the proposal gives the EPPO exclusive competence for PIF offences and removes competence for these offences from Eurojust;
- where competence falls for any Member State that does not participate in the EPPO, but does participate in Eurojust;
- the purported competence of the EU to propose that the EPPO can request Eurojust or its national members to use its powers to investigate acts that fall *outside* the EPPO’s scope of competence, (Article 57(2));
- the logistics and the cost of the EPPO’s operational relationship with Eurojust given that expenditure resulting from implementation of any enhanced cooperation, should this arise, should be borne by participating States (Article 332 TFEU);
- the impact on OLAF and its operation, resources and its recently reformed legal framework since the Government believes OLAF’s responsibilities would be scaled back significantly and the Commission envisages a transfer of staff from OLAF to the EPPO;
- allowing the EPPO to access Europol information on request “may risk the integrity of Europol’s operations and could deter Member States’ law enforcement bodies from sharing data openly”; and
- ensuring that the accountability mechanisms of the EPPO are suitably robust.

Financial Implications, including criticism of Commission’s impact assessment

Impact assessment

1.53 The Minister says that weaknesses of the Commission’s impact assessment include:

- its poor evidence base because it relies on data which:
 - simply stems from cases referred to OLAF and does not take into account other work at the national level, including the degree of prevention at source;
 - is mostly incomplete and much of the work is assumption driven: such as benefits for options 4c (decentralised, £2,720 million) and 4d (centralised £2,465 million) which are just assumed to be greater and “unsurprisingly they come out as the most effective solutions” and as confirmed by the Cost Benefit Analysis in Annex 4 which states that “*key parts of the analysis are based on assumptions*”;
 - relates to the UK and Denmark “which is misleading since neither country will participate in the EPPO”;
- assuming that the creation of the EPPO is the only effective way to resolve this problem and ignoring the options of “enhanced incentives or other options for reform in any detail or in a rigorous manner” and, significantly, “meaningful reform of the current national based system”;
- assessing all Member States’ current performance and the effectiveness of the options against a target of securing convictions in 100% of cases, since “the application of the principle of legality would be necessary to guarantee this (whereby some Member States are obliged to prosecute certain conduct rather than exercising discretion in the public interest), and the right to a fair trial means that it is for the courts at national level and not the EPPO to decide such matters based on the evidence provided to those courts”;
- ignoring the fact that difficulties (which would hamper decision-making) arising from differences in approach, language, culture would subsist even if investigation and prosecution were directed at the supra-national level;
- ignoring common law approaches in national law when considering the central approach (option 4d);
- failing to take into account: the complexity, size and length of cases, the proportionality of effort, existing international co-operation, the risk of delay, differing legal frameworks, the experience of the prosecuting authority, sentence (as a deterrent effect), the probability of being caught, resources and preventative measures;
- problematic costing, since the impact assessment:
 - asserts that the creation of the EPPO will come out of existing resources and it is difficult to believe that such a disruptive change could be cost neutral;
 - many of the costs in Annex 4 are left out as it is not possible to calculate them;
 - Annex 4 is also not as transparent as it should be with calculations of the majority of estimates not provided; and

- conflation of convictions and confiscation returns, despite the diversity of Member State systems meaning that no universal assumption can be made that that every conviction will mean a confiscation and recovery of funds to the centre.

Financial implications

1.54 The Government rejects the Commission's assertion that the central 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" as it has doubts about its accuracy and validity and "the inability to include figures for OLAF in the Estimated Financial Impact sections is worrying".

1.55 The Minister continues:

"We expect the EPP and Deputy EPP posts to be drawn from the central EU budget (unless the enhanced co-operation procedure is activated), but we will also expect a recharge for non-participating Member States for these costs. The Regulation also proposes that whenever the national prosecutor is acting as an EDP, the relevant expenditure shall be regarded as a Union budget cost. It is not clear how this "double-hat" funding will be administered. We do not support the relevant EPPO portion of their work being reimbursed from the central EU budget. The EPPO will also rely on the available resources in the participating Member States already dealing with "PIF offences", which also involve organised crime offences outside of the remit of the EPPO. This will further draw on national budgets of the participating Member States. The Government would also expect there to be a recharge to non-participating Member States for costs incurred by other Agencies, such as Eurojust, OLAF and Europol, in providing services to the EPPO."

Fundamental Rights

1.56 The Minister refers to Article 52 of the Charter of Fundamental Rights which requires any interference with Charter rights to be justified: it must be provided for by law, respect the essence of the right in question and be necessary and proportionate. He says that the Government takes the view that document (b) engages the following Charter rights: Article 7 (respect for private and family life), Article 8 (protection of personal data), Article 17 (right to property), Article 41 (right to good administration), Article 42 (right to access to documents), Article 47 (right to an effective remedy and to a fair trial), Article 48 (presumption of innocence and right of defence) and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence).

Data protection

1.57 The Minister says that there are some legal obligations in the measure which reflect a "more liberal regime" of data exchange and could collectively mean that the essence of Articles 7 and 8 of the Charter are not respected. He refers to the following Articles in the Regulation which we have already mentioned in our overview of the draft proposal: Articles 15(1), (2) and (3), Article 20, Article 21 and Articles 57(2) (a), 58(2), 60 and 61.

Nevertheless, the Minister concludes that, overall, the proposal complies with Article 52 of the Charter with respect to data protection because:

- Recital 17 and Article 11(1) of the measure state that the activities of the EPPO should in all instances be carried out in full respect of Charter rights;
- the proposal is intended to fit into existing (and future) data protection laws; and
- the purpose of the EPPO’s data exchange and processing powers appear to be related entirely to the EPPO’s general functions.

Suspects’ rights

1.58 The extensive investigative powers of the EPPO could affect suspects’ private and personal property rights under Articles 7 and 17 of the Charter and the right to a fair trial, the rights of the defence, the presumption of innocence and the principle of *ne bis in idem* as enshrined in Articles 47, 48 and 50 of the Charter. The Minister says:

“There will need to be further clarification as to why the EPPO requires such extensive investigatory powers and the impact that use of such powers will have on the Charter rights of affected individuals. It is questionable whether it is necessary and proportionate to grant the EPPO access to sensitive and draconian investigative powers, such as interception and surveillance, if the EPPO can just order law enforcement agencies to undertake investigative measures by simply relying on their own existing domestic powers (see Article 18(1) of the EPPO proposal).”

1.59 But overall, the Minister concludes that “although such investigatory powers may not be necessary or proportionate, it is likely that they will at least respect the essence of the particular rights in question” because the proposed Regulation makes clear that:

- the EPPO’s investigative powers are only exercised in participating Member States within the same legal frameworks that are currently available for domestic law enforcers and prosecutors;⁴⁵
- it is required to respect, in particular, the right to a fair trial, the rights of the defence, the presumption of innocence and the right not to be tried or punished twice in criminal proceedings for the same offence, as enshrined in Articles 47, 48 and 50 of the Charter; and
- it sets out an extensive set of minimum rights and states that the EPPO is obliged to comply with the rights of the suspect person enshrined in the Charter, including the right to a fair trial and the rights of the defence.

1.60 The Minister also highlights the risk that the EPPO’s proposed power to open a prosecution in a location of his choice could interfere with Articles 7, 17, 47, 48 and 50 of the Charter as the Member State chosen could have “a lower standard of criminal proceedings than another Member State”. However, he notes that:

⁴⁵ See Article 26(3) and (4) above.

- all other mutual recognition instruments are based on the concept of mutual trust of the criminal justice systems in other Member States;
- the EPPO is obliged to consider a number of factors before making a choice about jurisdiction and any such decision must be made taking into account the proper administration of justice; and
- it is possible that the EPPO proposal may in fact increase protections enshrined in Article 50 (the right not to be tried or punished twice in criminal proceedings for the same offence) since the proposal should mean that a reduction in the risk of multiple-country prosecutions in the case of cross-border fraud.

Effective remedies and good administration

1.61 The proposal may interfere with Article 41 (right to good administration) and Article 47 (right to an effective remedy and to a fair trial) of the Charter, especially the latter as, the Minister says, there “is a lack of detail on how the judicial review procedures would operate in practice”.

View of devolved administrations and overseas territories

1.62 The Minister says that upon consultation of the devolved administrations:

- Scotland has noted the Government’s position but has made no further comment at this time;⁴⁶ and
- Northern Ireland confirms that their prosecutorial and investigative functions are separate and that prosecutors in Northern Ireland do not have powers in relation to search, seizure, interception, surveillance, monitoring financial transactions or covert video surveillance.

1.63 Gibraltar has noted the Government’s intention not to participate in the draft Regulation and says that the proposal’s current wording conflicts with its written Constitution and usurps the role, functions and authority of the Attorney General and his Chambers (Gibraltar’s public prosecutor service) and the Royal Gibraltar Police (Gibraltar’s Police Authority).

Consultation

1.64 The Minister says that the Crown Prosecution Service, the Serious Fraud Office, the Attorney General’s Office, Serious Organised Crime Agency/National Crime Agency, the College of Policing, the Ministry of Justice, Her Majesty’s Treasury, Her Majesty’s Revenue & Customs, the Metropolitan Police, the Scottish Government, the Crown Office and

⁴⁶ Since the Minister’s Explanatory Memorandum, the Scottish Parliament has agreed to a motion that the EPPO proposal does not comply with the principle of subsidiarity. The conclusions of the 13th Report (2013, Session 4) of the Justice Committee of the Scottish Parliament *Report on the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office* (COM (2013)) 534 final) are attached to the draft Reasoned Opinion (at Annex 1 of this Report).

Procurator Fiscal Service, and the Public Prosecution Service for Northern Ireland have been consulted on the proposal.

Timetable

1.65 The proposal is expected to be presented at the October Justice and Home Affairs Council, with negotiations continuing into 2014. Only if and when Member States make clear that there is no unanimity of those participating would the Commission look to move to enhanced co-operation.

Conclusion

Opt-in debate

1.66 We recognise, like the Minister, that the Government's long-established intention of not participating in any proposal to establish an EPPO does not alleviate the need for active participation in the negotiations to ensure that the UK's "competences, rights and obligations" are not affected (Article 2 of JHA Protocol 21). We therefore welcome the Minister's comprehensive list of matters to be raised in negotiations which we set out at paragraph 1.52 of this Report chapter.

1.67 We note the Minister's suggestion of "includ[ing] reference to" the EPPO proposal in the Lidington debate the Government offered on the Eurojust proposal. As the Lidington commitments on Parliamentary scrutiny of JHA opt-in decisions allow for enhanced scrutiny of "the Government's recommended approach on the opt-in", we think that this encompasses the implications of the UK's non-participation in a measure, irrespective of how long non-participation has been a matter of fixed Government policy. Arguably, decisions of long-standing policy require greater parliamentary scrutiny given the passage of time and circumstance, in this case, since the policy's genesis in the 2010 Coalition Agreement. We therefore recommend that the opt-in decision be fully debated on the floor of the House and note that in the Written Ministerial Statement of 5 September the Government has offered a specific opt-in debate on the proposal. Although it is not our practice to agree to combine opt-in debates on separate documents, we consider that the obvious overlap between the EPPO and Eurojust proposals justifies their joint debate in this instance. We make this suggestion on the understanding that there will be opportunity for further debate on the EPPO proposal on the floor of the House on the question of whether the House should issue a Reasoned Opinion.

Compliance with subsidiarity

1.68 Whilst we appreciate that the UK has a significant interest in preventing criminal activity against the EU's financial resources, we agree with the Minister that the EPPO proposal breaches the subsidiarity principle and that a national-level approach, supported by existing EU mechanisms, would be more appropriate. In the attached Reasoned Opinion, we raise the following concerns:

1.69 the Commission must first establish that the objectives of the proposal cannot be sufficiently achieved by Member States at national level (first limb of the subsidiarity test). In the explanatory memorandum, the Commission’s subsidiarity analysis does not consider whether the stated objectives are necessary, only that they can better be achieved at EU level. In doing so it ignores the first limb of the subsidiarity test;

1.70 the Commission has not adequately considered the option of strengthening existing or alternative mechanisms which could be enforced at national and EU level (see the Government’s view at paragraph 1.50 of this Report chapter);

- **most significantly, the Commission has been too precipitate in not waiting to assess what impact the harmonisation of criminal offences and sanctions set out in the draft PIF Directive (on which a general approach has been recently agreed) will have on facilitating Member State investigation and prosecution of EU budget fraud, especially in cases involving cross-border activity. Ongoing uncertainty about the UK’s participation in that measure should 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; and**
- **the evidential basis of the “detailed statement” required by the Subsidiarity Protocol is undermined by the use of questionable data and flawed assumptions as comprehensively explained by the Government in paragraph 1.53 of this Report chapter.**

1.71 The second limb of the subsidiarity test requires the Commission to demonstrate that the objectives of the proposal can be better achieved at EU-level by reason of their scale and effects and the Subsidiarity Protocol requires this to be “substantiated by qualitative and, wherever possible, quantitative indicators”. We find the following problems with the Commission’s assertions of “EU-added value”:

- **the qualitative and quantitative indicators used are open to the same criticism referred to in paragraph 1.68 above;**
- **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;**
- **the supposed benefit of a “high level of respect and protection of the rights of individual and companies during investigations and prosecutions of EU fraud, in accordance with the Rule of Law” is unjustified, paradoxical and dismissive of existing protections for suspects in national criminal justice systems:**
 - **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’ right, would agree with that claim;**
 - **pressures on European Delegated Prosecutors to prioritise EU fraud cases and secure 100% conviction rates will entail 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 prioritised use of national resources for EU fraud prosecutions;
- the lack of detail on arrangements for judicial review undermines the compliance of the proposal 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.

Further points of concern

1.72 We ask the Minister to keep us informed of progress on any of the issues to be raised by the UK in negotiations. We also request the Minister to respond to the following questions before the holding of either the Reasoned Opinion or opt-in debates:

- a) We agree with the Minister's questioning of the use of the Article 86 TFEU legal base to legislate for criminal procedural rights which fall within Article 82(2) TFEU and to enable the EPPO to request Eurojust to investigate offences outside its remit. How does the Minister intend to proceed with this significant legal issue and would the Government be prepared to make a challenge to the ECJ in the absence of a successful resolution of this point?
- b) The Minister may be aware of our continuing concern about EU competence in respect of international agreements and we are particularly troubled by the prospect of EPPO powers in relation to Third Country Agreements (see paragraphs 1.38 and 1.52 of this Report chapter). Is the Minister looking to negotiate the removal of these provisions from the proposal?
- c) We support the Minister on the stance he is taking to ensure that non-participating Member States and their taxpayers do not subsidise the EPPO. What does the Minister propose to do if a successful outcome is not achieved?
- d) We note our predecessors' comments on the 2011 Green Paper about lack of democratic accountability for the EPPO functions. Even given the non-participation of the UK, does the Minister think the EPPO proposal (Article 70) goes far enough in recognising the need for accountability of the EPPO to national parliaments, particularly considering the Commission's decision that for some purposes the EPPO is to be regarded as a “national authority”?
- e) We note that the conviction rate of 23.1% for EU fraud cases referred to the UK by OLAF between 2006–11 is low compared with many other Member States. Can the Minister explain why this is and what action is being taken to address any shortcomings.

1.73 To summarise our Conclusions, we recommend that:

- a) the consequences of the Government's opt-in decision be debated on the floor of the House, together with the Eurojust proposal;**
- b) given the importance of the matters covered in them, that the debate should be for three hours;**
- c) the House sends the attached Reasoned Opinion to the Presidents of the EU institutions before 28 October 2013, following a debate on the Floor of the House;**
- d) the Minister responds to the questions in paragraph 1.70 above before either debate is held; and**
- e) the documents remain under scrutiny in the meantime.**

Annex: Reasoned Opinion

Draft 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)⁴⁷

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.

⁴⁷ COM(13) 534.