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45th Report of Session 2013-14 - European Scrutiny Committee Contents

10 Subsidiarity "yellow card": the European Public Prosecutor's Office

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

Legal base —

<i>Department</i>	Home Office
<i>Basis of consideration</i>	Commission's letter of 14 March 2014
<i>Previous Committee Report</i>	HC 83-xxviii (2013-14), chapter 8 (22 January 2014)
<i>Discussion in Council</i>	Not applicable
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Cleared

Background and previous scrutiny

10.1 An account of the Commission's Communication and its background was set out in our Thirty-first Report.[58] In brief, the Communication set out the Commission's response to the subsidiarity "yellow card" and Reasoned Opinions raised by national parliaments in respect of the draft Regulation on the establishment of a European Public Prosecutor's Office (EPPO)[59] and its decision to maintain the proposal. The Commission said that its response only addressed those grounds advanced by national parliaments which it considered to fall within the scope of the subsidiarity protocol and principle. It undertook to write, in due course, individual responses to national parliaments on arguments which it considered to be outside scope.

10.2 In our Report, we also set out the view of the then Minister for Security at the Home Office (James Brokenshire). He said that the Government was disappointed with the Commission's hasty review and its outright rejection of the multiple concerns raised by national parliaments on aspects which "directly underpin" the subsidiarity principle and democratic legitimacy. In addition to providing a critique of the Commission's individual arguments in the Communication, the Minister said that should individual responses to national parliaments from the Commission

prove unsatisfactory, the Government would support further calls from national parliaments for the Commission to take serious account of the concerns raised in relation the proposal.

10.3 We also provided our own assessment of the Commission's Communication in that Report. In summary, we considered that:

- the precipitate nature of the Commission's response suggested that it had treated the exercise as a formality rather than a conscientious review and had not considered the other options of amending or withdrawing the proposal. In dismissing all of the arguments advanced by national parliaments, its response lacked credibility and seemed driven by the expediency of needing to maintain the proposal;
- the Commission had not properly exercised the "margin of discretion" identified by Court of Justice case law which would require it to reconsider the compliance of the proposal with subsidiarity with an open mind;
- the Commission was wrong to interpret the scope of the subsidiarity control mechanism narrowly, therefore considering outside scope arguments advanced by the House of Commons (and other national parliaments) which were intrinsic to national parliaments' review of the merits of EU action in terms of them providing "EU-added value";
- it was unfortunate, despite prior opportunities to address the question of scope in the context of other Reasoned Opinions, that the Commission was only doing so now when faced with significant opposition to the proposal and at a point in the process when national parliaments were no longer empowered to challenge a draft legislative act;
- the Commission was wrong to say that it did not have to consider specifically the sufficiency of Member State action " at regional or local level", particularly in the context of the EPPO proposal which affects criminal justice dispensed through diverse systems and processes at the regional level of Member States; and
- the Commission was also wrong to assert that the existence of a legal base in the Treaties for the establishment of an EPPO meant that it could not *per se* breach the subsidiarity principle as, considering the wording of Article 5(1) TEU, it is the "use of Union competences" that is governed by the subsidiarity principle, not their mere existence; and
- that the EPPO proposal as maintained lacked democratic legitimacy given the disregard for national parliament concerns.

10.4 We recommended in our Report that the Communication be considered as part of the debate on relations between the Commission and national parliaments. That debate took place in European Committee on 30 January 2014.^[60] We also asked the Government to keep us informed of:

- i) whether the Commission honours the undertaking it gave in the Communication

(and which is already required by Article 7(1) of Protocol (No2) to the Treaties) to take the concerns of national parliaments into account during the negotiations of the EPPO proposal; and

ii) any developments indicating that the proposal was moving to the "enhanced co-operation" procedure.

The debate on 30 January 2014 on relations between the Commission and national parliaments

10.5 The question of the Commission's response to the "yellow card" raised on the EPPO proposal was addressed twice by the Minister for Europe (Mr David Lidington) during the debate on the relations between the European Commission and national parliaments. The Minister's first comment was:

"On the last point, I raised the Commission's disappointing response to the recent yellow card on the European public prosecutor's office, during the 17 December General Affairs Council. My concerns were shared openly by a number of other member states, which spoke in support.

"The Commission's response was, at best, unsatisfactory, and at worst, disrespectful of the views of the Parliaments of no fewer than 11 member states. After only four weeks' consideration, the Commission announced that its proposal on the EPPO would remain unchanged. Its response took a narrow view of subsidiarity, introduced no new evidence to justify the proposal and failed to engage with the thoroughness and detail that rightly should be expected with the genuine concerns that so many national Chambers had expressed. That makes the case for strengthening the yellow card mechanism more urgent."^[61]

10.6 At a later point in the debate, the Minister commented further:

"We have continued to raise that matter with the Commission. I raised it directly with the Commission when I was in Brussels last week. One thing we find frustrating about that decision is that there has not yet been what I would consider to be an adequate, detailed explanation from the Commission as to why it believed that the criticisms made by 11 national parliamentary chambers were inappropriate or misjudged.

"Whether or not one agrees with the Commission's position, one might have more respect for that position if the Commission was prepared to express its argument in detail. I will have further conversations with Commissioners over the next few weeks, and I intend to pursue the matter."^[62]

The Commission's letter of 14 March 2014

10.7 The Vice-President of the Commission, Maroš Šefčovič, says that the purpose of his letter is to address arguments submitted by the House of Commons in its Reasoned Opinion "which do not relate to the principle of subsidiarity" and so fall outside of the subsidiarity control mechanism and the Communication. He then presents the Commission's response to those individual arguments, with the aspiration that they will address the concerns of the House of Commons and can

form part of continuing political dialogue.

RISK OF VIOLATION OF FUNDAMENTAL RIGHTS

10.8 The House of Commons argued that the proposed mandatory model of prosecution (as opposed to the domestic national model) could lead to violation of suspects' rights, that a prioritised, target-driven system of prosecution for crimes affecting the financial interests of the Union may lead to inequality before the law and that victims of other crimes would be adversely affected by the consequent diversion of national resources.

10.9 The Commission says in response that:

- Article 11(1) of the EPPO proposal states that the EPPO shall ensure that its activities respect the rights set out in the EU Charter of Fundamental Rights;
- it disagrees that the choice of prosecution model affects procedural rights, because mandatory prosecution is in line with Treaty obligations of Member States and the Union to effectively combat crimes affecting the financial interests of the Union and would not mandate prosecutions in all circumstances, for example, in the case of minor offences or where "in the interests of the proper administration of justice" and "under certain conditions governed by the proposal" the EPPO offers a suspect a conditional dismissal. The EPPO would also have "a certain leeway to form a decision on bringing a case before a competent court or not" and that "it was not evident" that a discretionary model would be more favourable to suspects' rights; and
- it rejects the idea that the prioritised investigation and prosecution of crimes affecting the Union's financial interest could lead to inequality before the law because given "the distinct areas of competence, the proposal does not prejudice the efficiency and the effectiveness" of the investigation and prosecution of other crimes, nor the risk of conviction. "Similar considerations" apply to the view that prioritisation could affect victims of other crimes.

RULE OF LAW UNDERMINED BY LACK OF DETAIL ON JUDICIAL REVIEW

10.10 In response to the House's argument that the proposal's compliance with the Rule of Law was undermined by the lack of detail on arrangements for judicial review, the Commission says that since Article 86 TFEU provides that the EPPO shall act as a prosecutor in the competent courts of the Member States, the proposal treats it as a national authority for the purposes of Judicial Review so that "all challengeable acts of investigation and prosecution" of the EPPO would be reviewed by the national courts. Additionally, preliminary references to the Court of Justice would still be possible pursuant to Article 267 TFEU. Combined, these two judicial processes "would ensure a comprehensive level of judicial scrutiny and hence ensure compliance with the law".

DISADVANTAGES BOTH FOR PARTICIPATING AND NON-PARTICIPATING MEMBER STATES

10.11 The House of Commons argued that participating Member States would lose the prerogative to prioritise prosecution activities within their criminal justice systems; non-participating Member States would be prejudiced by the reduction in the competences of Eurojust and OLAF.

10.12 The Commission rejects this argument because:

- Member States are obliged by the Treaties to "make available the necessary resources and means to effectively protect the Unions' financial interests" and that this would be "without prejudice" to the Member States' prerogative to prioritise prosecution in other areas of criminal activity;
 - there would be no disadvantage resulting from reduced competence and staffing at OLAF because although it would no longer carry out administrative investigations as regards Union fraud with respect of participating countries, it would remain competent for the remaining Member States;
 - due care would be taken to ensure that Eurojust remains "sufficiently staffed to successfully continue its tasks which go beyond" fighting crimes against the EU budget; and
 - overall, it considers the proposal would cause "no adverse impact on either Eurojust or OLAF".
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PARTIAL PARTICIPATION WILL NOT ACHIEVE UNION-WIDE ENFORCEMENT

10.13 The House of Commons argued that an incomplete single legal area across the Union resulting from the non-participation of some Member States in the proposal, would not achieve an equivalent level of enforcement throughout the Union. The Commission responds that:

- because Article 86 TFEU provides for adoption by enhanced co-operation in the absence of unanimity, partial participation of Member States *per se* is not a valid argument against the establishment of the EPPO; and
- it is the Commission's aim that as many Member States as possible participate in the proposal and that any participation represents an improvement to the current fragmentation caused by 28 different legal regimes and that the reference to "single legal area" is to be understood in terms of those Member States who participate in the proposal.

Our assessment

10.14 As we stated in our last Report, we stand by our view that the arguments addressed by this Commission letter are not outside the scope of the subsidiarity control mechanism as they are intrinsic to national Parliaments' review of the merits of EU action in terms of them providing "EU-added value" (the second limb of the subsidiarity test in Article 5(3) of the Treaty on the European Union ("TEU")).

10.15 Nor are we convinced by the Commission's arguments that the EPPO proposal and its mandatory prosecution model will not pose a risk to suspects' fundamental rights. We do not see how a mandatory model which starts with the

presumption that a prosecution must be taken if there is sufficient evidence in support and is only moderated by a vague degree of discretion described as "a certain leeway" can be equated with a discretionary model. In such a model as exists in England and Wales, the evidential test (sufficiency of evidence test) is just one stage in the Full Code Test for Crown Prosecutors,[63] with the wide discretion allowed within the second stage, the Public Interest test, amounting to more than "a certain leeway". Also, the House of Commons' reference to suspects' rights has been too narrowly interpreted by the Commission as being tantamount to "procedural rights" whereas it was meant in a broader sense to include other fundamental rights, for instance, the need to protect a suspect's fundamental right to liberty or right to a private or family life. Such a right could be engaged, for example, if they were to be subject to disproportionate enforcement action by the State resulting from mandatory prosecution where their individual level of culpability in a fraudulent enterprise was minimal.

10.16 We also reject the unrealistic assumption that the Commission makes in relation to impact on other areas of prosecutorial activity and priorities, that Member States can, particularly in terms of economic adversity, simply ring-fence and prioritise investigative and prosecutorial resources for one type of criminal activity, without that having any impact on residual resources available for the investigation and prosecution of other crimes.

10.17 We do not see how repeating assertions made previously about the EPPO being subject to both Judicial Review and Article 267 TFEU proceedings, answers the House of Commons' concern about lack of *detail* concerning Judicial Review arrangements.

10.18 There remains a real risk of non-participating States being disadvantaged by reduced resources at OLAF because the inability of OLAF to investigate crimes in other countries will undermine the existing levels of co-operation between Member States on this type of criminal activity. It also remains to be seen, whether it is possible to separate so cleanly, staffing requirements for fighting EU budget fraud crimes from others. There will undoubtedly be some loss in cross-cutting expertise in the investigation of different types of crimes across the EU.

10.19 Finally, whatever the degree of participation in the EPPO proposal, it is patently misleading to describe this as a "single legal area" with connotations of the participation of all Member States entailed, for example, by the "single market". In any event, in terms of strict subsidiarity arguments, it equally does not follow from the existence of a Treaty base which permits partial participation, that a proposal which relies on that legal base cannot be challenged in terms of the "EU-added" value requirement of the principle. This would particularly be the case if the level of fragmentation between participating and non-participating states was such that it negated any purported benefit of internal coherence of the "legal area" of participating states.

Conclusion

10.20 We take this opportunity to restate our disappointment with the Commission's approach to the "yellow card" raised by national parliaments

on the proposed Regulation on the establishment of a European Public Prosecutor's Office (the EPPO proposal).[64] As with our Report on the Communication, we will send a copy of this Report to the Commission, with a covering letter, drawing its attention to our further concerns.

10.21 Although we now clear the current document, we continue to keep the EPPO proposal under scrutiny. We therefore ask that the Government responds, when appropriate, to our outstanding requests for information on this document (set out in the conclusions of our Thirty-first Report), in the course of our ongoing scrutiny of the EPPO proposal.

58 See headnote. [Back](#)

59 (35217) 12558/13: Draft Regulation on the establishment of the European Public Prosecutor's Office. [Back](#)

60 *Stg Co Deb*, European Standing Committee B, 30 January 2014, cols. 3-18.
[Back](#)

61 See footnote 61, col. 5-6. [Back](#)

62 See footnote 61, col. 9. [Back](#)

63
https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html.
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64 See footnote 60. [Back](#)

