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DER STATEN-GENERAAL

House of Representatives of the States General position paper with regard to the establishment of a European Public Prosecutor's Office (EPPO)

Introduction

The House of Representatives of the States General considers the effective prevention of fraud affecting EU funds extremely important, due in part to the importance of efficient spending of European funds and confidence in the performance of the European Union. It goes without saying, therefore, that fraud affecting EU funds should be investigated, prosecuted and tried. Grants should be withdrawn in the event of fraud and/or if a Member State fails to effect or inadequately effects the investigation, prosecution and trial of such fraud. We note that Article 86 of the Lisbon Treaty provides an *opportunity* to implement a European Public Prosecutor's Office (hereafter referred to as EPPO) and not an obligation for Member States to accept a proposal thereto, regardless of the content.

Subsidiarity objections

A vast majority of the House of Representatives is of the opinion that investigation, prosecution and trial is a (primarily) national competence. Transferring this competence would impair the sovereignty of the national state. In order to assess the scale of the breach of sovereignty it is essential that the powers are clearly delineated. The present wording of the proposal offers no such delineation, leaving it unclear where the proposed powers of the EPPO end and those of the Member State begin. In addition, the democratic legitimacy of the investigative and prosecution authorities (and the trial) is essential. It must be possible to provide democratic accountability within the Member State for the consequences of investigation and prosecution. It is not acceptable that democratic control will be exercised solely on the basis of an annual report submitted to the European Parliament and that democratic control can only be exercised by the European Parliament, whereas the actual investigative and prosecutorial actions are carried out in the Member State and by the competent authorities of that Member State. Intensive co-operation between the Member State's authorities and Eurojust and OLAF would also enable fraud affecting EU funds to be tackled more effectively without EPPO. The House of Representatives furthermore believes that the objective – effective prevention of fraud affecting EU funds – can be achieved without breaching the sovereignty of the Member States. These are the primary reasons why the House of Representatives cannot accept the European Commission's present proposal to establish an EPPO. Such has been bindingly laid down for the Dutch Government by MPs Recourt and Van Oosten in a motion requesting the government not to agree with the establishment or foundation of an EPPO as set out in the proposal at hand¹.

First and foremost, the objections of the House of Representatives relate to subsidiarity. Subsidiarity is co-determined by the content and thus the proportionality of the proposal and both aspects are stated in this position paper. Having taken note of the proposal by the Greek Presidency², the House of Representatives will formulate an alternative which, in the

¹ 32317-189

² 33709-6



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opinion of a majority of the House of Representatives, could meet the requirements in terms of subsidiarity and proportionality and could achieve the intended goal: effective prevention of fraud affecting EU funds. An EPPO could still be established to enable the application of the provisions of Article 86 of the TFEU without unnecessarily breaching the sovereignty of the Member States.

Crucial points regarding subsidiarity

- Investigation and prosecution regarding fraud is (primarily) the responsibility of national authorities;
- The power to investigate and prosecute criminal offences which damage the financial interests of the Union are insufficiently defined, making it impossible to determine the scale of a breach of sovereignty (legality principle);
- Democratic control of the investigative and prosecution authorities must be possible. The proposed assessment by the European Parliament on the basis of an annual report is inadequate;
- As the actual investigation and prosecution actions (and trial) are carried out in the Member State itself, these actions should be democratically controlled by bodies in the relevant Member State;
- With the aid of Eurojust and OLAF, the investigation and prosecution of fraud affecting EU funds can also be organised without an EPPO;
- The intended objective – effective prevention of fraud affecting EU funds – can also be realised without a breach of sovereignty of the Member States by the foundation of an EPPO as formulated below.

History

European Commission's proposal

On 17th July 2013, the European Commission published the proposal for a Regulation concerning the establishment of the European Public Prosecutor's Office (hereinafter referred to as EPPO). At the same time, the Regulation to reform the EU Agency dealing with judicial co-operation in criminal matters (Eurojust) was also published, as well as a notification on OLAF, the European Anti-Fraud Office³. This package of draft legislation fulfils Article 86 of the Treaty on the Functioning of the European Union (TFEU), the Lisbon Treaty. This Article provides for the possible establishment of an EPPO with the power to investigate, prosecute and bring to justice those who commit criminal offences affecting the Union's financial interests.

The European Commission proposes the establishment of an EPPO with the exclusive authority (Art. 11) to investigate and prosecute fraud with European funds (Art. 4) and inextricably related criminal offences (Art. 13), with a European Public Prosecutor heading a

³ COM(2013) 534, COM(2013) 535 and COM(2013) 533



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body with a centralised structure (Art. 6) and a power to overrule to prioritise investigation into fraud with EU funds in the Member States (Art. 11).

Functioning of the subsidiarity mechanism ('yellow card')

Together with 13 other parliaments from 11 Member States of the EU, the House of Representatives has expressed objections to a European Public Prosecutor's Office. The European Commission initially responded with a Notification (November 2013). This Notification set out reasons as to why the parliaments' objections regarding subsidiarity are unfounded. A letter to each separate Parliament or House considered the objections submitted which, according to the European Commission do not relate to subsidiarity and fall outside the field of application of the subsidiarity control mechanism. With this review, the Commission apparently deviates from the position of 2009 that the limitations of the subsidiarity principle are extremely difficult to define⁴.

The House of Representatives considers the European Commission's response extremely unsatisfactory. The arguments put forward by the House of Representatives do concern the subsidiarity of the proposal. The Treaty allows the European Commission to disregard the opinion of a large number of parliaments. This is an option which should be considered as a last resort, not in the case of justified subsidiarity objections from a large number of parliaments of the Member States.

Proportionality objections

The proposed authorities have not been defined clearly enough and are too far-reaching

The European Commission's proposal creates a lack of clarity as to the scope of the authority of an EPPO. The limitation of this to the authority to act in the event of damage to the Union's financial interests should be clearly defined. The present proposal creates a lack of clarity and leads to authority problems. This is in conflict with the legality principle. Furthermore, the implicit authority relating to other criminal offences offers too much scope for the expansion of authorities without doing justice to the relevant provisions of the Lisbon Treaty. This is contrary to legal certainty. The offences for which an EPPO may prosecute should be clearly defined in the actual Regulation. A realistic threshold is not provided as a result of which proceedings will only be taken to investigate and prosecute in the event that investigation and prosecution by an EPPO are indeed opportune.

It is unclear to the House of Representatives how the proposed exclusive authority of an EPPO relates to the efforts of the Member States to criminally prosecute fraud on a national level. It is strange that Member States wishing to actively prosecute fraud affecting EU funds would no longer be able to do so, not even if this would produce results more quickly, more effective and less expensive. Furthermore, the House of Representatives considers an

⁴ [Barroso \(2009\) D/2652](#)



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EPPO's power to overrule in order to ensure that national authorities facilitate European investigation and prosecution problematic, as this would have consequences for national priorities and the gauging on a national level of how investigative means can be used most effective. This is also inconsistent with the democratic control exercised on the national priorities. The Regulation focuses on co-operation between an EPPO and the national criminal authorities but is unclear as to how any conflicts between an EPPO and the national authorities should be resolved. The proposed Regulation is inadequate as regards the delineation of the EPPO's authority and the distribution of authority between the EPPO and the Member States.

The Greek Presidency published its own proposal on 17 March 2014. This is based on a college model. Each Member State would delegate a Public Prosecutor, who subsequently conducts the investigation and prosecution. Whilst the House of Representatives finds the idea interesting, it also realises that a college model EPPO could involve more bureaucracy. In its favour, it would make the EPPO more recognisable and possibly improve acceptance of decisions made by the EPPO.

European Public Prosecutor's Office as an 'ultimum remedium'

The House of Representatives finds that fraud affecting EU funds generally occurs at national, regional or local levels. Adequate prevention of this fraud is consequently dependent on decisive action taken on the corresponding level within the Member States. The House of Representatives is of the opinion that the optimum use of existing European mechanisms, expressly including the withdrawal of EU funds, offers sufficient possibilities for effective fraud prevention.

First and foremost, the House of Representatives stresses the importance of far-reaching co-operation between the national investigation and prosecution authorities of the Member States. In addition, the European Commission could focus more on improving and strengthening the independence, effectiveness and efficiency of OLAF and Eurojust and facilitating improved collaboration between these authorities and the Member States. The role of OLAF, as fraud watchdog, is crucial to the detection of fraud affecting EU funds. OLAF should therefore continue to exist in its current form to provide both judicial authorities in the Member States and an EPPO with information. The discontinuation of OLAF in favour of an EPPO is undesirable.

A majority of the House of Representatives believes that, in the event of cross-border fraud or fraud in several Member States, an EPPO, in whatever form, could fulfil a role either at the request on the Member States or otherwise. If no prosecution is brought or prosecution is not adequately followed through – due to a lack of co-operation or a conflict between or negligence on the part of national authorities – an EPPO could provide added value if co-operation within Eurojust does not guarantee the collective investigation and prosecution. The task of an EPPO could then be: the supervision of investigation and prosecution in the individual Member States, advising on such and, at worst, to initiate investigation and



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prosecution if the Member State fails to take adequate action. The EPPO therefore serves as an ultimum remedium. The Member State has prime authority to initiate investigation and prosecution. The EPPO may only act in the event that the Member State neglects to do so. The EPPO advises and supervises. The college model is an interesting alternative in this respect.

A majority of the House of Representatives feels that the European Public Prosecutor's Office would consequently play a valuable role in the prevention of fraud affecting EU funds provided that it is organised in such a way that it can be deployed if all other possibilities have been exhausted. This alternative proposal satisfies the intended objective: the effective prevention of fraud affecting EU funds and meets the subsidiarity objections of a large number of parliaments.

Crucial points regarding proportionality

- The formulation of the proposal for an EPPO is too vague;
- The proposal would lead to the erosion rather than the strengthening of OLAF and Eurojust;
- OLAF should not be dismantled;
- Fraud prevention should be in place at the same level at which the fraud occurs: local, regional or national;
- The exclusive authority of an EPPO is undesirable, especially if the Member State is itself prepared to undertake the investigation and prosecution;
- The delineation of the exclusive authority is unclear;
- The implicit authorities formulated will lead to a vague and unintended expansion of the authorities;

Alternative proposal

- Investigation and prosecution is primarily the task of the Member States;
- An EPPO could offer added value in the role of supervisory authority for investigation and prosecution in the Member States;
- An EPPO can provide the national authorities with solicited and unsolicited recommendations regarding effective investigation and prosecution of fraud affecting EU funds;
- Eurojust ensures the co-operation between the Member States;
- An EPPO would only have any added value if the co-operation within Eurojust is inadequate or international implications necessitate that an EPPO be deployed;
- OLAF should continue to exist;
- The EPPO can only take over the investigation and prosecution if the Member State continues not to undertake investigation or is insufficiently proactive in this respect;
- The EPPO will acquire exclusive authority only in the event of non-performance by the national authorities of the Member States;



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- The Member States can prevent the EPPO from acquiring exclusive authority by doing what they should do: implementing a strict approach to combating fraud affecting EU funds;
- A college model would be interesting provided attention is paid to the increase in bureaucracy;
- Making these adjustments would meet the subsidiarity objections of the parliaments and achieve the objective.

The House of Representatives calls on the European Commission to seek, through consultation with the national parliaments, to realise a proposal that can count on wider support from the representatives of the citizens of Europe. In addition, the House of Representatives calls on the European Parliament, when considering this proposal, to include in their deliberations the objections of the national parliaments of European Member States and the suggestions for an alternative submitted by both the Greek Presidency and the House of Representatives. With due respect, the House of Representatives asks the national parliaments of the Member States to include the proposed alternatives in their deliberations and to co-operate in the realisation of a method acceptable to many, if not all, Member States for the effective prevention of fraud affecting EU funds. Of course, the members of the House of Representatives expressly reserve the right to judge a possible end result as a whole on its merits.

The Hague, 11 April 2014

On behalf of the House of Representatives of the States General

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Rapporteur on the European Public Prosecutor's Office