

REPORT 34/2014 BY THE JOINT COMMITTEE FOR EU AFFAIRS, DATED SEPTEMBER 22, 2014, ON THE COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY BY THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EU, EURATOM) No 883/2013 AS REGARDS THE ESTABLISHMENT OF A CONTROLLER OF PROCEDURAL GUARANTEES [COM (2014) 340 FINAL] [2014/0173 (COD)] {SWD (2014) 183 FINAL}.

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality attached to the Lisbon Treaty of 2007, in force since December 1st, 2009, establishes a procedure allowing national parliaments to verify European legislative initiatives' compliance with the subsidiarity principle. The said Protocol has been developed in Spain by Act 24/2009, of December 22, amending Act 8/1994, of May 19. In particular, new articles 3 j), 5 and 6 of Act 8/1994 are the legal basis for this report.

B. The Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees (hereinafter "the Proposal"), has been adopted by the European Commission and conveyed to the national parliaments which have a deadline of eight weeks to verify the subsidiarity check of the initiative, being the deadline September 22, 2014.

C. The Bureau and the Spokespersons of the Joint Committee for EU Affairs agreed on September 9, 2014, to examine the said European legislative initiative, appointing to that end as Rapporteur MP Juan Moscoso del Prado Hernández and requesting the Government the report envisaged in section 3 j) of act 8/1994.

D. The Government has conveyed its report, which indicates that the Proposal complies with the principle of subsidiarity, since 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.

E. The Joint Committee for EU Affairs, in its meeting held on September 22, 2014, adopted the following:

OPINION

1.- Article 5 (1) of the Treaty on the European Union indicates that “*the use of Union competences is governed by the principles of subsidiarity and proportionality*”, and adds in Article 5 (3) of the same Treaty that “*under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall only act 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*”.

2.- The examined legislative Proposal is based on Article 325 of the Treaty on the Functioning of the European Union, which lays down the following:

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

5. The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.”

3.- The objectives of the proposal are to further strengthen the procedural guarantees in place for all persons under investigation by the European Anti-Fraud Office (OLAF) and to take into account the special way in which members of EU institutions were elected or appointed as well as their special responsibilities which may justify specific provisions aimed at ensuring the proper functioning of the institutions to which they

belong. To this end, Regulation No 883/2013 on investigations by OLAF is to be amended.

4.- These objectives will be achieved by establishing a Controller of procedural guarantees, tasked with two functions:

- Reviewing complaints lodged by persons under investigation about violation of their procedural guarantees,
- Authorising OLAF to conduct certain investigative measures in respect of members of EU institutions.

5.- Concerning the first of this tasks, when examining a complaint, the Controller would review whether procedural guarantees provided for in Article 9, Regulation No 883/2013 were respected. For example, he would review whether the notice period for inviting persons concerned to an interview was respected, without, however, taking any position on whether and how to conduct this interview. He would listen to both parties involved before issuing a non-binding recommendation to the Director-General of OLAF. If the Director-General chooses not to follow the Controller's recommendation, he should state the reasons for doing so in a note attached to the final investigation report submitted to the national authorities or, where relevant, to institutions, bodies, offices or agencies of the European Union concerned. Given the nature of the tasks the Controller will be entrusted with, the position should be held by a person with senior legal expertise in the fields of fundamental rights and criminal law, and eligible to be appointed to judicial office in at least one Member State or in an EU Court. He should be able to perform his duties in complete independence and within the time limits foreseen in this Regulation.

6.- Regarding the use of certain investigative measures towards members of EU institutions, a new measure is proposed, whereby the Director-General of OLAF must ask for the Controller's authorisation if OLAF intends to carry out an inspection of the professional offices of these members. This includes taking of copies of documents or any other form of data storage located in their professional offices. This requirement is inspired by the proposal for a European Public Prosecutor's Office as the future EPPO will require similar authorisation from the competent judicial authorities in Member States. This is to reflect the special way in which members of EU institutions have been appointed or elected, as well as their particular responsibilities and their status, which may justify specific provisions to ensure the proper functioning of the institutions to which they belong.

7.- Concerning the compliance with this Proposal with the principle of subsidiarity, we must proceed on the basis that the initiative considered is but a modification of the Rules of Procedure of a European Union institution. Member States cannot establish something like the Controller of Procedural Guarantees, which could potentially

condition OLAF's work, by means of provisions of domestic law. For this reason, the examined Proposal complies with the subsidiarity principle.

CONCLUSION

For the aforementioned reasons, the Joint Committee for EU Affairs considers that the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 as regards the establishment of a Controller of procedural guarantees, complies with the principle of subsidiarity laid down in the Treaty on the European Union in force.