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Courtesy translation

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betreft Reasoned opinion (breach of subsidiarity) on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office (DOC(2013)534)

ons kenmerk 153768.01U

Dear Mr Barroso,

In accordance with the applicable procedure, the Senate and the House of Representatives of the States General in The Netherlands have assessed the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office on the basis of the principle of subsidiarity. As such, use was made of Article 5 of the EU Treaty and Protocol 2 of the Treaty on the Functioning of the European Union concerning the application of the principles of subsidiarity and proportionality.

This letter serves to inform you of the reasoned opinion of the Senate of the States General. Identical letters have been sent to the European Parliament, the Council, and the Dutch government.

The majority of the Senate is of the opinion that the proposal is in conflict with the principle of subsidiarity¹. According to the principle of subsidiarity the European Union should only undertake action if this is more effective than action taken at national level, so if the Member States are not sufficiently able to achieve the objectives of the proposed action. The majority of the Senate is of the opinion that the European Commission fails to sufficiently justify the added value of a European approach.

The Senate endorses the importance of effective combating of fraud with EU means, but considers criminal law to be primarily a national competence. That is why investigation and prosecution of such offences is primarily a duty of national authorities.

Moreover, the Senate has observed that as a rule fraud is committed at national or local level and that adequate combating of fraud therefore depends on taking a firm line at that level. The Commission did not adequately substantiated the added value of the creation of a new EU competence in the field of criminal investigation and prosecution. The Senate gives preference to a EU focus on improving and strengthening the independence, effectivity and efficiency of OLAF en its cooperation with member states, rather than weaken this, as the Commission pro-

¹ This majority consists of the fractions: VVD (People's Party for Freedom and democracy, 16 seats), PVV (Party for Freedom, 10 seats), SP (The Socialist Party, 8 seats), ChristenUnie (Christian Union, 2 seats), 50PLUS (50PLUS, 1 seat), PvdD (Party for the Animals, 1 seat), OSF (Independent Senate Group, 1 seat).



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poses. Moreover, the Commission argues in the impact assessment that member undertake inadequate action against EU-fraud, but this argument lacks a solid basis, nor do the communications of OLAF.

Besides, the powers given to the EPPO are too far reaching; these should be reserved to the national authorities. The exclusive powers to be given to the EPPO involve the risk of prosecution of offences at national level to be obstructed, partly because it remains unclear how far the definition of "the financial interests of the Union" stretches. Moreover, the EPPO has the overriding power to make sure that national offices facilitate European investigations, which involves the risk that European investigations will prevail over national priorities and the national assessment on how criminal investigation instrument can be deployed against fraud most effectively. Consequently, actions taken by the EPPO may lead to conflicts with national authorities in the relation with these authorities. Moreover, the proposal of the European Commission does not make clear how a conflict has to be settled in such a situation.

Although the European Public Prosecutor's Office is admittedly intended to have exclusive competence in respect of crimes affecting the Union's financial interests, such a demarcation will hardly ever be achievable, certainly in practice. Crimes, particularly in complex cases, virtually never stand on their own, but are generally a combination of different breaches of the law. Major problems of coordination and complicated issues of prioritisation are foreseen, partly because breaches of the law are so closely interwoven.

Furthermore, the Senate is of the opinion that making optimal use of existing national and European mechanisms provides sufficient facilities for effective combating of fraud with EU-means. In order to achieve effective combating of EU fraud the European Commission must optimize the existing mechanism of Eurojust and the European Anti-Fraud Office OLAF. The Senate also sees added value in intensified cooperation between the investigation and prosecution offices of the Member States.

For the aforementioned reasons, the Senate of the States General considers in majority the proposal to establish the EPPO to be inconsistent with the principle of subsidiarity.

Yours sincerely,

Ankie Broekers-Knol
President of the Senate of the Netherlands