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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 combat against fraud with 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 with EU funds should be investigated, prosecuted and tried. Grants and subsidies should be withdrawn in the event of fraud and/or if a Member State fails to investigate, prosecute and condemn such fraud effectively. 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 by any proposal it is essential that the competences are clearly delineated. The present wording of the proposal offers no such delineation, leaving it unclear where the proposed competences 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 is essential 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 law enforcement authorities of that Member State. Intensive co-operation between the Member State's authorities and Eurojust and OLAF would also enable fraud with EU funds to be tackled more effectively without EPPO. The House of Representatives furthermore believes that the objective – effective combat against fraud with 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 of the European Commission¹.

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 discussed in this position paper. Having taken note of the proposal by

¹ 32317-189



Tweede Kamer

DER STATEN-GEREAAL

the Greek Presidency², the House of Representatives will formulate an alternative which, in the 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: the effective combat of fraud with 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 – the effective combat of fraud with 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 17 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.

² 33709-6

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



Tweede Kamer

DER STATEN-GENERAAL

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

Functioning of the subsidiarity mechanism ('yellow card')

Together with 13 (chambers of) other parliaments from 11 Member States of the EU, the House of Representatives has expressed objections to the EPPO. 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 opinion, 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 unsatisfactory. Even though 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 only 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 competences have not been defined clearly enough and reach too far

The European Commission's proposal contains a lack of clarity as to the scope of the competence of an EPPO. The limitation 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 competence problems. This is in conflict with the legality principle. Furthermore, the implicit competence relating to other criminal offences offers too much scope for the expansion of competences without doing justice to the relevant provisions of the Lisbon Treaty. This is contrary to legal certainty. The offences for which an EPPO is competent should be clearly defined in the actual Regulation. A realistic threshold is not provided as a result of which there is no limit to the competence of EPPO to investigate and prosecute.

It is unclear to the House of Representatives how the proposed exclusive competence of EPPO relates to the efforts of the Member States to criminally prosecute fraud on a national

⁴ [Barroso \(2009\) D/2652](#)



Tweede Kamer

DER STATEN-GEREAAL

level. It is strange that Member States wishing to actively prosecute fraud with 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 the EPPO's power to overrule national authorities problematic, as this would have consequences for national priorities and the consideration on a national level of how investigative means can be used most effectively. This is also problematic for 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 regarding the delineation of the EPPO's authority and the division of the competences 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 in its own member state. Whilst the House of Representatives finds the idea interesting, it also realises that a college model 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 with EU funds generally occurs at national, regional or local levels. Adequate prosecution 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 optimal use of existing European mechanisms, including the withdrawal of EU funds, offers sufficient possibilities for the effective combat against fraud.

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 agencies and the Member States. The role of OLAF, as fraud watchdog, is crucial to the detection of fraud with 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 of the Member States or in other circumstances. 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 investigation and prosecution.



Tweede Kamer

DER STATEN-GENERAAL

The task of an EPPO could then be: the supervision of investigation and prosecution in the individual Member States, advising on such and, as a last resort, to initiate investigation and prosecution if the Member State fails to take adequate action. The EPPO therefore serves as an ultimum remedium. The Member State remains competent 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 may be an interesting suggestion 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 prosecution of fraud with 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 combat of fraud with 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 prosecution 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 competences as formulated will lead to a vague and unintended expansion of competences;

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 with 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;



Tweede Kamer

DER STATEN-GENERAAL

- The EPPO will acquire exclusive competence only in the event of non-performance by the national authorities of the Member States;
- The Member States can prevent the EPPO from acquiring exclusive competence by doing what they should do: implementing a strict approach to combating fraud with EU funds;
- A college model would be interesting provided attention is paid to the increase in bureaucracy;
- Making these adjustments may 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 Council of Ministers and the European Parliament, when considering this proposal, to include in their deliberations the objections of the national parliaments of Member States of the EU and the suggestions for an alternative proposal submitted by both the Greek Presidency and the House of Representatives of the Netherlands. 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 cooperate in the realisation of a method acceptable to many, if not all, Member States for the effective combat against fraud with EU funds. To conclude, the members of the House of Representatives reserve the right to judge the end result on its merits.

The Hague, 11 April 2014

On behalf of the House of Representatives of the States General

Ard van der Steur

Rapporteur on the European Public Prosecutor's Office