



The Scottish Parliament  
Pàrlamaid na h-Alba

## **Justice Committee**

### **13th Report, 2013 (Session 4)**

# **Report on the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)**

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## **Justice Committee**

### **Remit and membership**

#### **Remit:**

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

#### **Membership:**

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John Finnie  
Christine Grahame (Convener)  
Colin Keir  
Jenny Marra (Deputy Convener)  
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## Justice Committee

### 13th Report, 2013 (Session 3)

#### **Report on the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)**

The Committee reports to the Parliament as follows—

#### BACKGROUND

1. At its meeting on 3 September 2013, the Committee considered whether the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) complies with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. The Committee's consideration was prompted by concerns highlighted by both the UK and Scottish governments in relation to the proposal's compliance with the subsidiarity principle and included taking evidence from the Cabinet Secretary for Justice.

#### OVERVIEW OF PROPOSAL

2. The European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO) (COM(2013) 534 final) was published on 17 July 2013, with a view to tackling EU fraud. Under the proposal, the EPPO would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of offences against the Union's financial interests.<sup>1</sup> Article 25(1) of the legislative proposal states that, "for the purposes of investigations and prosecutions conducted by the EPPO, the territory of the Union's Member States shall be considered a single legal area in which the EPPO may exercise its competence".<sup>2</sup>

3. The Commission has identified that suspected fraud amounted to an average of £425 million in each of the last three years, but suggests that the actual amount

<sup>1</sup> Home Office (7 August 2013). *Explanatory Memorandum on European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)*.

<sup>2</sup> European Commission (17 July 2013). *Proposal for a Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final)*. Available at: [http://ec.europa.eu/justice/criminal/files/regulation\\_eppo\\_en.pdf](http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf)

is “likely to be significantly higher”<sup>3</sup>. The Commission believes that “Member States are not able satisfactorily to identify, investigate and prosecute EU fraud” and that “a new supra-national EU criminal justice body with investigation and prosecution powers would be best placed to protect the EU’s financial interests”<sup>4</sup>.

4. The UK Government has confirmed that it does not intend to participate in this proposal.<sup>5</sup>

## SUBSIDIARITY

### **Principle of subsidiarity**

5. Article 5 of the Treaty on European Union sets out the principle of subsidiarity as follows—

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and 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”.

### **Commission position**

6. The Commission believes that the proposal meets the principle of subsidiarity.

7. It argues that “combatting crimes affecting the financial interests of the Union can be better achieved at Union level by reason of its scale and effects”. It goes on to state that “the present situation, in which the prosecution of offences against the Union’s financial interests is exclusively in the hands of the authorities of the Member States does not sufficiently achieve that objective”. The Commission therefore concludes that “steering and co-ordinating investigations and prosecutions of criminal offences affecting its own financial interests ... can only be achieved at Union level”.<sup>6</sup>

### **UK Government position**

8. In its Explanatory Memorandum of 7 August 2013, the UK Government states that it does not believe that the principle of subsidiarity has been met.

9. It argues that “the Commission does not ... provide robust evidence to justify the creation of a new supra-national agency with extensive and harmonised powers, acting through one new single legal territory across the whole Union and all Member States”.<sup>7</sup> It goes on to state that “the Commission does not explore or

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<sup>3</sup> Home Office (7 August 2013). Explanatory Memorandum.

<sup>4</sup> Home Office (7 August 2013). Explanatory Memorandum.

<sup>5</sup> Home Office (7 August 2013). Explanatory Memorandum.

<sup>6</sup> European Commission (17 July 2013). Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office.

<sup>7</sup> Home Office (7 August 2013). Explanatory Memorandum.

assess alternative approaches to deliver a strengthened system to prevent EU fraud at source at national level”.<sup>8</sup>

### Scottish Government position

10. In correspondence to the Committee of 26 August, the Cabinet Secretary for Justice confirmed the Scottish Government’s view that the proposal may breach the principle of subsidiarity. He argued that “there is little or no evidence that consideration has been given to possibilities short of the creation of a new supra-national agency with extensive and harmonised powers”.<sup>9</sup>

11. In further correspondence of 2 September, the Cabinet Secretary explained that the EPPO would have exclusive competence to investigate, prosecute and bring to judgement those connected to offences against the EU’s financial interests (so-called PIF offences) and that this could also be extended to include other offences inextricably linked to the PIF offence under investigation.<sup>10</sup> He added that “the new proposals would mean that the EPPO would in relation to certain offences have the power to direct investigative activity at national level and not just in relation to PIF offences but other connected offences. This, he argued, would cut across the role of the Lord Advocate as the head of the system of prosecution in Scotland”.

12. During evidence heard by the Committee on 3 September, the Cabinet Secretary stated that there could also be difficulties in relation to the direction and operation of investigations carried out by the police and other law enforcement agencies.<sup>11</sup> Furthermore, he confirmed that the EPPO would be able to change or apply different rules of evidence to those which exist in national jurisdictions.

13. The Cabinet Secretary told the Committee that the Scottish Government agreed with the UK Government that the Commission had not made the case for its position that it is necessary to establish the EPPO to achieve better detection and prosecution of EU fraud and that this cannot be achieved by Member States working individually and together.<sup>12</sup> He further argued that the proposal to move directly towards an EPPO was premature and that more efforts should be made to help support national governments improve tackling EU fraud.<sup>13</sup>

### CONCLUSION

**14. The Committee does not consider that the establishment of the EPPO is necessary in order to achieve the stated objective of tackling EU fraud or**

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<sup>8</sup> Home Office (7 August 2013). Explanatory Memorandum.

<sup>9</sup> Scottish Government (26 August 2013). Correspondence from Cabinet Secretary for Justice to the Committee on proposal to establish a European Public Prosecutor’s Office. Available at: [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/General%20Documents/20130826\\_CSfJ\\_EU\\_proposals.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130826_CSfJ_EU_proposals.pdf)

<sup>10</sup> Scottish Government (2 September 2013). Correspondence from Cabinet Secretary for Justice to the Committee on proposal to establish a European Public Prosecutor’s Office. Available at: [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/General%20Documents/20130902\\_CSfJ\\_EU\\_proposals.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/General%20Documents/20130902_CSfJ_EU_proposals.pdf)

<sup>11</sup> Justice Committee. *Official Report*, 3 September 2013.

<sup>12</sup> Justice Committee. *Official Report*, 3 September 2013.

<sup>13</sup> Justice Committee. *Official Report*, 3 September 2013.

**that action at EU level would bring greater benefits than Member States could achieve collectively. Furthermore, we have concerns that the Commission has not explored sufficiently whether action short of a supra-national agency would be capable of delivering effective protection against EU financial fraud.**

**15. The Committee therefore agrees that the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) does not comply with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union.**

#### RECOMMENDATION

**16. The Committee recommends that the Parliament agrees that the European Commission Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final) does not comply with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union.**

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