

Justice Committee

Letter from the Cabinet Secretary for Justice to the Convener

Proposed EU legislation proposal

In view of your Committee's interest in their subsidiarity aspects, I am writing to give you further information on the position of the Scottish Government concerning the recent proposals on a European Public Prosecutor's Office (EPPO), and on Eurojust reform.

As the Committee is aware, our starting point on EU proposals is to engage and participate positively during their development and to seek to influence issues of concern or specific interest. The starting point for that engagement is to ensure that proposals are consistent with the principle of subsidiarity, which regulates the exercise of powers within the European Union and the relative competence of the Union and member states.

The principle of subsidiarity is defined in Article 5 TEU:

“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.

“The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.”

The key to our position is our system of prosecution, with the Lord Advocate at its head. Decisions by the Lord Advocate in his role as head of the prosecution system are taken by him “independently of any other person”. This is currently provided for in section 48 of the Scotland Act 1998, but of course is a very ancient and fundamental principle. Any proposal that would trespass on these arrangements raises obvious subsidiarity concerns in the context of our Scottish system.

The proposals unquestionably would impact on the position of the Lord Advocate, were they enacted in the form proposed. That on the EPPO would give that Office exclusive competence to investigate, prosecute and bring to judgement those connected to offences against the EU's financial interests (so-called PIF offences). This competence could also be extended to include other offences inextricably linked to the PIF offence under investigation. The investigative powers and measures proposed would be extensive and any investigative activity could be directed at national level.

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 would cut across the role of the Lord Advocate as the head of the system of prosecution in Scotland and the sole

prosecutor. Moreover investigations into offences are undertaken by the police and other law enforcement agencies under the direction of the prosecutor. The Lord Advocate has power to direct the Chief Constable in relation to investigations: there may be a conflict, therefore, in the direction of investigations as well.

The Explanatory Memorandum on the EPPO prepared by the UK Home Office (EM 12558/13) and submitted on 7 August 2013, sets out in paragraphs 44 to 48 views on the issue of subsidiarity, specifically that the UK Ministers “do not believe that the principle of subsidiarity has been met” for this measure.

The Explanatory Memorandum states that “*the UK will not participate*” in the EPPO.

The separate Explanatory Memorandum prepared by the UK Home Office on Eurojust (EM12566/13), also submitted on 7 August, sets out the UK Government position on this measure. The UK has not yet decided its final position on the Eurojust proposal.

The position on Eurojust is, potentially, different with reference to subsidiarity because Eurojust is an existing EU Agency. However, on Eurojust we are concerned that there has been a move in granting powers to National Members from the current position of being able to order investigative measures “in agreement with the competent national authorities” (current Article 9c) to an ability to order such investigations in undefined urgent cases, without those authorities’ agreement, as proposed in draft Article 8(3). This overrides national prosecution systems in a way which the original Eurojust measure does not.

The Eurojust proposal is also linked with that for an EPPO, in that the EPPO would operate from within Eurojust, and the proposal includes measures necessary to ensure that Eurojust can support the EPPO. The subsidiarity failure of the EPPO proposal is thus echoed in the Eurojust proposal.

We do not feel that these proposals have been adequately considered. It is noteworthy that the Eurojust proposal contains no bespoke impact assessment. The EPPO proposal does not consider how less drastic measures, such as a more effective use of OLAF (the European Anti-Fraud Office) might achieve the desired results without over-riding national systems in such a dramatic fashion.

We are fully supportive of measures which enable and assist independent justice agencies within Member States to work together effectively on cross-border investigations and dealing with serious and organised crime. However, we do not believe that the case has been made by the Commission for its position that it is necessary to establish the EPPO to achieve the better detection and prosecution of EU fraud and that this cannot be achieved by Member States working together and individually. Equally, on Eurojust, we do not believe that the proposals presented by the Commission meet the Treaty requirements that “*Eurojust’s mission shall be to support and strengthen coordination and cooperation*” but, “*with respect for fundamental rights and the different legal systems and traditions of Member States.*”

I hope this information is of assistance to the Committee.

Kenny MacAskill MSP
Cabinet Secretary for Justice
2 September 2013