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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL AND THE NATIONAL PARLIAMENTS**

**on the review of the proposal for a Council Regulation on the establishment of the  
European Public Prosecutor's Office with regard to the principle of subsidiarity, in  
accordance with Protocol No 2**

# **COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE NATIONAL PARLIAMENTS**

## **on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2**

### **1. BACKGROUND**

#### **1.1. Commission proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office**

On 17 July 2013, the Commission adopted a proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office.<sup>1</sup> The Commission's proposal is based on Article 86 of the Treaty on the Functioning of the European Union (TFEU), which empowers the Council to establish that Office in order to combat crimes affecting the financial interests of the Union.

Article 86(1) TFEU provides for a special legislative procedure requiring unanimity in the Council and the consent of the European Parliament.<sup>2</sup> The Treaty also foresees a specific procedure according to which the proposal can be adopted through enhanced cooperation in the absence of unanimity in the Council. The Treaty requires for this procedure the participation of at least nine Member States and an absence of consensus in the European Council. In such a case the authorisation to proceed with enhanced cooperation shall be deemed to be granted without the need of a formal act of the Council.

The Commission's commitment to fighting fraud and enhancing the protection of taxpayers' money has been constant over the years, but results in the area of criminal prosecution remain disappointing. In view of the fact that the Union budget is chiefly administered at national level, common European solutions are necessary to make the fight against fraud more effective across the Union. In this context, President Barroso announced in September 2012 the "intention to establish a European Public Prosecutor's Office, as foreseen by the Treaties".<sup>3</sup>

The proposal is part of a package of measures aimed at better protecting the Union's financial interests.<sup>4</sup> This objective has great importance in the current economic and fiscal context. The damage caused by fraud and other offences affecting the Union's budget is significant, as confirmed over the years by the Union's annual statistics.<sup>5</sup> Those offences have a very negative effect on the public and private sectors, generating important economic and social costs.

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<sup>1</sup> COM(2013) 534.

<sup>2</sup> Under Protocol 22 TFEU, Denmark does not take part in the adoption of the proposed Regulation. The United Kingdom and Ireland have not notified their wish to take part in the adoption and application of this Regulation under Protocol 21 TFEU.

<sup>3</sup> State of the Union 2012 Address, Strasbourg, 12 September 2012.

<sup>4</sup> COM(2013) 535.

<sup>5</sup> See Commission annual Reports of 2011 and 2012 on the protection of the European Union's financial interests – Fight against fraud, COM(2012) 408 and COM(2013) 548.

## 1.2. Key features of the Commission proposal

In accordance with Article 86 TFEU, the Commission has proposed to establish the European Public Prosecutor's Office to investigate, prosecute and bring to judgement the perpetrators of offences affecting the Union's financial interests. The European Public Prosecutor's Office will be established as a body of the Union with a decentralised structure which, for most of its activities, would rely on national investigation and prosecution authorities, and on national law. The principles of efficiency, independence and accountability lie at the heart of the model proposed by the Commission. The proposal is based on respect of the national legal traditions and judicial systems of the Member States and aims at consistency and speedy action.

The decentralised structure would consist of a single organisation with two layers: a central unit which would essentially supervise, coordinate and, where necessary, direct investigations and prosecutions carried out in the Member States, and the European Delegated Prosecutors, who would generally carry out such investigations and prosecutions autonomously. These European Delegated Prosecutors would be part of both the European Public Prosecutor's Office and national prosecution services. The European Public Prosecutor's Office would thus be smoothly embedded into national justice systems and could rely on national procedural rules, national courts and national law enforcement resources, while pursuing efficiently the common European objective to fight against fraud to the detriment of the Union budget.

## 1.3. The subsidiarity control mechanism

In accordance with Protocol No 2 to the Treaties on the application of the principles of subsidiarity and proportionality, from the date of transmission of a draft legislative act national Parliaments have eight weeks to consider whether it is compatible or not with the principle of subsidiarity. As regards legislative proposals submitted on the basis of Article 76 TFEU (Title V, Chapters 4 and 5), the threshold provided for in Article 7(2) of Protocol No 2 is one quarter of the votes allocated to national Parliaments (as opposed to the normal threshold of one third of the votes). Where reasoned opinions issued by national Parliaments for non-compliance with the principle of subsidiarity reach that threshold, the proposal has to be reviewed by the Commission. On the basis of that review, the Commission decides whether to maintain, amend or withdraw the proposal, and it must give reasons for its decision.

Within the deadline laid down in Article 6 of Protocol No 2, fourteen chambers of national Parliaments<sup>6</sup> had sent reasoned opinions to the Commission, thus triggering the subsidiarity control mechanism provided for in Article 7(2) of Protocol No 2. The threshold of Article 7(3) of Protocol No 2 has not been reached. In addition, it is to be noted that at the date of adoption of this Communication, four national Parliaments (RO *Senat*, DE *Bundesrat*, PL *Senat* and PT *Assembleia da República*) sent opinions in the framework of the political dialogue which did not consider the proposal to be incompatible with the principle of subsidiarity.

The Commission confirmed the triggering of the subsidiarity control mechanism of Article 7(2) of Protocol No 2 on 6 November 2013.

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<sup>6</sup> See Annex 1. The issued reasoned opinions represent 18 votes out of 56. In accordance with Article 7(2) of Protocol No 2, the threshold to trigger the review is 14.

## 2. SUBSIDIARITY CONCERNS RAISED BY THE NATIONAL PARLIAMENTS

### 2.1. Introductory remarks

The Commission has carefully analysed the reasoned opinions submitted by national Parliaments from the perspective of the principle of subsidiarity.

That principle is enshrined as follows in Article 5(2) of the Treaty on European Union (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 procedure of Article 7(2) of Protocol No 2 is exclusively focused on the principle of subsidiarity and in reasoned opinions within the meaning of Article 6 of Protocol No 2 national Parliaments need to state why they consider that a draft legislative act does not comply with that principle. As a result, legal or policy arguments not connected to subsidiarity are not examined in detail in this Communication. The Commission is however well aware that the limits of the principle of subsidiarity are not easy to trace and has therefore adopted an open attitude towards the reasoned opinions, interpreting their arguments, insofar as possible, in the light of the principle of subsidiarity.

The subsidiarity test involves two closely interrelated questions: first, whether the proposed action can or cannot be sufficiently achieved by the Member States acting on their own; and second, whether the action can be, by reason of its scale or effects, better achieved at Union level. Both steps are connected, as the insufficiency of Member State action will often lead to a finding that Union action will better achieve the proposed policy objective. The text of Article 5(3) TEU makes the connection clear (‘but can rather’) and the Court of Justice of the European Union has often carried out one single analysis of the two questions, implicitly recognising a certain margin of discretion to the Union institutions.<sup>7</sup>

According to Article 5(3) TEU, the principle of subsidiarity does not apply to the exclusive competences of the Union. The competence to establish the European Public Prosecutor's Office (Article 86 TFEU) is not among the exclusive competences set out in Article 3 TFEU and is not an exclusive competence by nature (i.e. a competence that, although it is not listed in Article 3 TFEU, could only be exercised by the Union and for which the subsidiarity analysis is irrelevant). Therefore, the principle of subsidiarity applies to Article 86 TFEU.

However, the drafters of the Treaty have expressly provided for the possibility of establishing the European Public Prosecutor's Office in Article 86 TFEU, including among its responsibilities the investigation and prosecution of crimes affecting the Union's financial interests in the courts of the Member States. This provision gives a strong indication that the establishment of the European Public Prosecutor's Office cannot be considered *per se* and in the abstract to be in breach of the principle of subsidiarity (as correctly pointed out by the MT *Kamra tad-Deputati* and the SI *Državni Zbor*). What has to be examined is whether the insufficiency of Member State action and the added-value of Union action justify the establishment of the European Public Prosecutor's Office and that issue has to be judged in light of the different aspects of the proposal, i.e. the way in which the Office would be established and the rules and procedural powers that would frame it.

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<sup>7</sup> See, for example, Case C-58/08, *Vodafone* [2010] ECR I-4999, paragraph 72; or Case C-377/98, *Netherlands v Parliament and Council* [2001] ECR I-7079, paragraph 32.

In analysing the reasoned opinions, the Commission has distinguished between arguments relating to the principle of subsidiarity, or that could be interpreted as subsidiarity concerns, and other arguments relating to the principle of proportionality, to policy choices unrelated to subsidiarity, or to other policy or legal issues. The arguments concerning the principle of subsidiarity are the following:

- The reasoning concerning subsidiarity (section 2.2);
- The alleged sufficient character of existing mechanisms (section 2.3);
- The added-value of the proposal (section 2.4);
- Issues relating to the structure of the European Public Prosecutor's Office (section 2.5);
- Issues relating to the nature and scope of its competences (section 2.6).

Other arguments fall outside the scope of the subsidiarity control mechanism. They will be duly taken into account in the process of negotiating the Proposal and will be addressed in the political dialogue, and namely in the individual replies to be sent to the relevant national Parliaments. These arguments can be summarised as follows:

- The Regulation is too far-reaching (SE *Riksdag*, SI *Državni Zbor*)
- The European Public Prosecutor's Office's powers are too far-reaching and should be reserved to national authorities (NL *Tweede Kamer*, *Eerste Kamer*);
- The Regulation goes beyond what is necessary to achieve its objective (SE *Riksdag* and others);
- The Regulation may violate the protection of fundamental rights guaranteed by the Czech Constitution and the Charter (CZ *Senát* and UK *House of Lords* and *House of Commons*);
- The Regulation would create disadvantages for Member States in that they lose the capacity to prioritise prosecution activities within their own criminal justice systems (UK *House of Lords* and *House of Commons*, and NL *Tweede Kamer*, *Eerste Kamer*);
- Article 26 of the proposal contains investigation measures which are not allowed under national law in all Member States and this may undermine the effective protection of the rights of suspects (CY *Vouli ton Antiprosopon*).

The Commission would also like to emphasise that some of the reasoned opinions expressed support for the establishment of a European Public Prosecutor's Office, whilst questioning specific elements of the Commission's proposal. This is the case of the opinions of MT *Kamra tad-Deputati*, and of the FR *Sénat*. In addition, the CZ *Senát* considered that the cooperation of European Delegated Prosecutors as part of one office may be more effective and swifter than existing mechanisms in transnational cases.

## **2.2. Reasoning concerning subsidiarity**

A number of national Parliaments (CY *Vouli ton Antiprosopon*, UK *House of Commons*, HU *Országgyűlés*) consider that the Commission did not sufficiently explain the reasons why its proposal is compatible with the principle of subsidiarity. In particular, the UK *House of Commons* considers that the reasons given by the Commission are insufficient, because the explanations should be contained in the explanatory memorandum, not only in the impact assessment, and because they consider that the Commission has conflated the first and the

second steps of the analysis (insufficiency of Member State action and added-value of Union action).

The Court of Justice has stated that the obligation under Article 296, second subparagraph, TFEU to give reasons underpinning legal acts requires that the measures concerned should contain a statement of the reasons that led the institution to adopt them, so that the Court can exercise its power of review and so that the Member States and the nationals concerned may learn of the conditions under which the Union institutions have applied the Treaty.<sup>8</sup> In the same judgment, the Court accepted an implicit and rather limited reasoning as sufficient to justify compliance with the principle of subsidiarity.

In the present situation, the explanatory memorandum and the accompanying legislative financial statement of the Commission sufficiently explain why the action of the Member States is insufficient with regard to the policy objective and why Union action would better achieve that objective (e.g. lack of continuity in enforcement action and lack of an underlying common European prosecution policy). As stated above, it is obvious that both conclusions are connected in this case. Even so, and contrary to the allegations of the UK House of Commons, the Commission has not ‘conflated’ both issues, but explained in detail why it considers that Member State action is insufficient and that Union action would better achieve the policy objective. These reasons are supplemented by the impact assessment, mentioned in a number of reasoned opinions, which is by its nature much more detailed. The Commission recalls that in the *Vodafone* case the Court of Justice referred to an impact assessment of the Commission to justify respect for the principle of proportionality.<sup>9</sup> The Commission considers that the impact assessment report is also relevant in the context of respect for the principle of subsidiarity, supplementing the reasons given in the explanatory memorandum and in the legislative financial statement.

The Commission therefore considers that its proposal is sufficiently substantiated with regard to the principle of subsidiarity.

### **2.3. Member State action, existing mechanisms or proposed legislation**

A number of national Parliaments (CY *Vouli ton Antiprosopon*, CZ *Senát*, IE *Houses of the Oireachtas*, NL *Eerste Kamer* and *Tweede Kamer*, RO *Camera Deputaţilor*, SI *Državni Zbor*, SE *Riksdag*, UK *House of Commons*) express the view that investigation and prosecution action at Member State level is sufficient and that the coordination and investigation mechanisms existing at the Union level (Eurojust, Europol and OLAF) would also be sufficient. SE *Riksdag*, UK *House of Commons* and CY *Vouli ton Antiprosopon* state that the Commission should have waited for the adoption of its proposed Directive on the fight against fraud to the Union's financial interests by means of criminal law<sup>10</sup> before envisaging new legislation in this field. The UK *House of Commons* also considers that the Commission did not sufficiently examine measures to prevent fraud.

As regards the argument that Member State investigative and prosecution action would be sufficient, at least as regards some Member States, and that Union action should rather concentrate on those Member States where there might be weaknesses (SE *Riksdag*, SI *Državni Zbor*), the Commission points out that the subsidiarity principle requires a comparison between the efficiency of action at the Union level and action at the Member State level. The situation in particular Member States is therefore not decisive in itself, as long

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<sup>8</sup> Case C-233/94, *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 25.

<sup>9</sup> Cited in Fn. 6, paragraphs 55 to 60.

<sup>10</sup> COM(2012) 363 of 11 July 2012.

as it can be shown that action at the level of the Member States is generally insufficient, and that Union action would generally better achieve the policy objective.

From that perspective, the Commission notes that objective and clear statistical information shows that the Treaty objective of an effective, deterrent and equivalent level of protection is not achieved in general.<sup>11</sup> The analysis of OLAF's annual statistics indicates that national criminal proceedings are not effective as they last too long. In a period of five years between 2006-2011, the number of actions<sup>12</sup> in which no judicial decision in the Member States had yet been taken was at 54,3%.<sup>13</sup> The OLAF statistics further demonstrate that there is a lack of deterrence. In the same period more than half of actions transferred by OLAF to the judicial authorities of the Member States were dismissed before trial<sup>14</sup> and the average conviction rate remained low (42,3%). These data relate to cases in which OLAF already took the decision that the received information justified the opening of an investigation and also carried out its preliminary investigation. Finally, according to the statistical data available to OLAF, the degree of successful prosecution varies from Member State to Member State therefore, leading to a lack of equivalence of the protection of the Union's financial interests across the Member States. From 2006-2011, conviction rates of actions transferred by OLAF to Member States' judicial authorities ranged from 19,2% to 91,7% (not including Member States with rates of 0% and 100%).<sup>15</sup> Therefore, contrary to the opinions of some national Parliaments (CZ *Senát*, NL *Eerste Kamer* and *Tweede Kamer*, UK *House of Commons*), which question the data provided by the Commission, there is a solid basis of statistical evidence demonstrating that in general terms the action taken at Member State level in the specific area of Union fraud is insufficient.

The UK *House of Commons* further contends that the Commission has not considered the sufficiency of action "at regional or local level, particularly important where devolved administrations may have discrete criminal justice systems". The Commission considers that this argument is not convincing. The division of powers between a Member State, its regions and its municipalities is a purely internal matter. When the Commission refers to the insufficiency of Member State action, that statement necessarily encompasses all the possible levels of Member State action, including the regional and the local levels.

Concerning existing mechanisms at Union level, whilst there is always room for improvement, both at national and Union level, the Commission remains convinced that in this case those improvements would at best have marginal effects because of their inherent limitations. None of the existing mechanisms or bodies at Union level can address the shortcomings identified in view of their limited powers.

For years, OLAF has supported the Member States' authorities in their tasks in this area. However, the powers of OLAF are limited to administrative investigations. OLAF thus cannot carry out criminal investigations *sensu stricto*, nor access information on criminal investigations. In addition, the findings of OLAF set out in its final reports do not lead automatically to the initiation of criminal proceedings by the competent authorities of the Member States. They are mere recommendations and national authorities, administrative or

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<sup>11</sup> OLAF report 2011, pp. 18-20.

<sup>12</sup> An action represents a criminal action pursued against a single natural or legal person in one country's jurisdiction. Each case may contain multiple actions in a number of countries.

<sup>13</sup> Percentage of actions transferred in the period from 2006-2011 by OLAF to Member States without reported judicial decisions, OLAF report 2011, table 6, p. 20.

<sup>14</sup> 51,2% of the actions transferred in the period from 2006-2011 by OLAF to Member States with reported judicial decision were dismissed before trial, OLAF report 2011, table 6, p. 20.

<sup>15</sup> OLAF report 2011, table 6, p. 20.

judicial, are free to decide what action to take, if necessary.<sup>16</sup> Recently, a reform of OLAF entered into force.<sup>17</sup> Whilst the reform aims at improving the efficiency and transparency of the current administrative investigations it cannot be expected to have any substantial impact on the level of criminal investigation and prosecution of offences in the area of Union fraud.

There are also inherent limitations concerning the role played by Europol and Eurojust. These bodies are entrusted with cooperation and coordination tasks, but they have no powers to conduct or direct investigations or prosecutions themselves, nor can they be given such powers under the applicable provisions of the Treaty. Whilst Eurojust may request the initiation of an investigation, it cannot ensure its follow up on a Member State level, nor direct national investigations or prosecutions. In this context the Commission has proposed further improvements to the functioning of both Europol and Eurojust this year.<sup>18</sup> However, even the most far reaching reform of Eurojust, which would give the agency the power to initiate criminal investigations, could not address the present shortcomings in the prosecution of Union fraud. The proposed changes of the existing structures are expected to lead to some improvements, but by the very nature of those structures they cannot address the insufficient level of investigations and prosecutions in the Member States.

Harmonisation of substantive criminal law is an important element of the overall protection of the Union's financial interests. As stated, the Commission has put forward a proposal for a Directive on the fight against fraud to the Union's financial interest by means of criminal law.<sup>19</sup> Nevertheless, harmonised definitions of offences and sanction levels will not, as such, produce satisfactory results without being accompanied and supported by effective investigation and prosecution measures. The proposal for that Directive and the proposal to establish a European Public Prosecutor's Office have different, although complementary, objectives. The proposed Directive aims at harmonising definitions of relevant offences, introducing common sanctions, as well as harmonising time limitation periods. The Commission considers that it does not need to wait to be in a position to assess the results of the proposed Directive before proposing the establishment of the European Public Prosecutor's Office. The results of the proposed Directive do not have any direct bearing on the subsidiarity test regarding the current proposal.

In addition, with regard to measures aimed at preventing fraud, the anti-fraud strategy provides for integrated measures to prevent, detect and investigate fraud. However, given that not all fraud can be prevented, prevention efforts need to be complemented by an effective and deterrent enforcement mechanism, as norms work better when strong non-compliance mechanism exist.

Finally, none of the existing mechanisms or bodies can address the shortcomings identified in relation to the admissibility of cross-border evidence, the identification of cross-border links, or getting assistance from authorities in other Member States, nor can these issues be addressed through measures taken solely at Member State level. The Commission therefore

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<sup>16</sup> See, for example, Case T-29/03, *Comunidad Autónoma de Andalucía v Commission* [2004] ECR II-2923, paragraph 37; and Case T-309/03, *Camós Grau v Commission* [2006] ECR II-1173, paragraph 51.

<sup>17</sup> Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 248, of 18 September 2013, pp. 1-22) which entered into force on 1 October 2013.

<sup>18</sup> See COM 2013(173) for Europol and COM 2013(535) for Eurojust. The implementation period for the previous Eurojust reform (Council Decision 2009/426 JHA of 16 December 2008) expired on 4 June 2011.

<sup>19</sup> COM(2012) 363.



maintains that, as regards investigations and prosecutions, a genuine improvement of the protection of the Union financial interests may only come through the establishment of the European Public Prosecutor's Office.

The Commission therefore considers that, in accordance with Article 5(3) TEU, the objectives of the proposed action cannot be sufficiently achieved by the Member States, by existing mechanisms or by proposed legislation.

#### **2.4. Added-value**

A number of national Parliaments (CZ *Senát*, HU *Országgyűlés*, RO *Camera Deputaţilor*, NL *Eerste Kamer* and *Tweede Kamer*) question the added-value of the proposal, whilst some acknowledge the advantages of setting up the European Public Prosecutor's Office. For example, the MT *Kamra tad-Deputati* considers that the European Public Prosecutor's Office would provide added-value. The UK *House of Commons* is of the opinion that the Commission did not demonstrate that Union-level action could achieve better results. The UK *House of Lords* states that the assumptions of the Commission are overly optimistic.

Contrary to these statements, the Commission considers that the system proposed would bring significant added-value in the fight against Union fraud. There are many elements which substantiate this view.

One of the main improvements is expected to come from a common Union-level prosecution policy. This will address the wide divergences between the different Member States on how Union fraud is investigated and prosecuted. This will also prevent forum shopping by perpetrators and create more deterrence, as fraudsters will be aware that the risk of detection, investigation and prosecution is considerably increased throughout the Union.

In addition, the proposal tackles a number of important practical and legal issues. For example, the fact that the European Public Prosecutor's Office would deal with all cases of fraud affecting the financial interests of the Union means that it would be possible to discover cross-border links which might not be noticed in purely national investigations. It would also be possible to more effectively direct and coordinate investigations, since the European Public Prosecutor's Office would have an overview of all the available information, and would therefore be in a position to determine where the investigation can most effectively be pursued.

The proposed structure, with its European Delegated Prosecutors, would also mean that it would no longer be necessary to use time consuming mutual legal assistance procedures for obtaining information or evidence: since all European Delegated Prosecutors would work within the same structure, in most cases a simple contact with a colleague would suffice.

Another element which the Commission expects to bring significant added-value is the proposed way of handling cross-border evidence. Unlike the current practice, evidence collected in accordance with the law of one Member State should be admitted in the trial, unless its admission would adversely affect the fairness of the procedure or the rights of defence, even if the national law of the Member State where the trial court is located provides for different rules on the collection or presentation of such evidence.

In this context, the CZ *Senát* expresses the concern that the proposal is lowering procedural standards and the CY *Vouli ton Antiprosopon* states that, as the list of investigative measures would include measures not allowed under national law, it would not ensure the necessary level of protection. However, in so far as these arguments may be relevant for the subsidiarity test, the proposal strengthens procedural standards by providing a Union catalogue of

procedural safeguards and of investigative measures for which prior judicial authorisation by national courts is mandatory under Union law, in addition to mandatory provisions under national law.

Finally, the creation of a decentralised European Public Prosecutor's Office would pool expertise and know-how in investigating and prosecuting Union-fraud cases at the European level and yet ensure proximity of action to the place of the crime.

The Commission thus considers that, pursuant to Article 5(3) TEU, the objectives of the proposed action can be better achieved, by reason of their scale and effects, at Union level.

## **2.5. Structure of the European Public Prosecutor's Office**

A number of national Parliaments also raise concerns with respect to the proposed structure of the European Public Prosecutor's Office. The FR *Sénat* informs the Commission that while the establishment of the European Public Prosecutor's Office was welcome in itself, it does not support the creation of a central office with hierarchical competences. The FR *Sénat* would rather favour a collegial structure representing all the Member States and electing a president from among its members, possibly with a rotation among those States. According to the RO *Camera Deputatilor*, the Commission should have sufficiently justified the non-collegial character of the proposed structure. The MT *Kamra tad-Deputati* also declares to be in principle in favour of establishing the European Public Prosecutor's Office. However, in its view the proposed structure and the competences attributed to it are not the only and best conceivable solution, and the college structure would adhere more closely to the principle of subsidiarity. Finally, the HU *Országgyűlés* is of the opinion that the exclusive right of instruction (Article 6(5) of the proposal) would put the operation of the European Delegated Prosecutors as integrated into the Member State's prosecution system into question.

According to the Commission, the arguments included in the reasoned opinions in favour of a collegial structure and against the organisational model set out in the proposal are more related to the principle of proportionality than to that of subsidiarity. Indeed, the FR *Sénat* expressly argues that in proposing a "centralised" structure the proposal exceeds what is necessary to achieve the objectives of the Treaties, echoing the language of Article 5(4) TEU (principle of proportionality).

In addition, according to the Commission a collegial structure is not necessarily less centralised than that of the proposal: it is merely a different way of organising the European Public Prosecutor's Office, which would in any event remain an office of the Union. Hence the comparison between the decentralised model of the proposal and the collegial structure preferred by a number of national Parliaments is not a comparison between action at the Union level and action at the Member State level, but a comparison between two possible modes of action at the Union level. In the Commission's view, that is not a question concerning the principle of subsidiarity.

The structure of the European Public Prosecutor's Office may however be relevant for the principle of subsidiarity in a different way. Indeed, its structure, organisation and powers could have an influence on whether the proposed action can be better achieved at Union level, and that is an issue that clearly concerns the principle of subsidiarity. From that point of view, the Commission considers that creating the European Public Prosecutor's Office with a fully-fledged collegial structure could hamper its efficiency, rendering its decision-making less efficient. For the same reason, a collegial structure for prosecution services is not a model that is generally used in the Member States or in international organisations such as the International Criminal Court, especially with regard to the need of adopting swift operational

decisions in concrete cases. Through such a structure, some of the expected advantages of the European Public Prosecutor's Office could be hampered.

However, for a number of internal matters a quasi-collegial approval is foreseen in the proposal. Article 7 thereof gives to a forum of ten members (the European Public Prosecutor, his four Deputies and five European Delegated Prosecutors) the power of adopting the internal rules of procedure. These rules have a major operational importance since they will cover, inter alia, the organisation of the work of the European Public Prosecutor's Office, as well as the general rules on the allocation of cases. This approach does not compromise its efficiency.

Finally, the European Delegated Prosecutors are, in functional terms, an integral part of the European Public Prosecutor's Office. They exercise the powers of the European Public Prosecutor's Office. A clear chain of command, including the new possibility of giving instructions, is indispensable for its effective decision-making and operation.

The Commission therefore considers that the structure of the proposed European Public Prosecutor's Office is compatible with the principle of subsidiarity.

## **2.6. Nature and scope of competence of the European Public Prosecutor's Office**

The issue of the competence of the European Public Prosecutor's Office is raised by several national Parliaments. The NL *Eerste Kamer* and *Tweede Kamer*, the HU *Országgyűlés*, the RO *Camera Deputaţilor* and the SI *Državni Zbor* do not support the exclusive competence of the European Public Prosecutor's Office. The NL *Eerste Kamer* and *Tweede Kamer*, as well as the UK *House of Lords* also see the risk that European investigations would be able to override the priorities set by the Member States on how to use criminal investigation instruments and resources most effectively. The CY *Vouli ton Antiprosopon* states that the provisions on ancillary competence indirectly extend the scope of the proposed legislation. The CZ *Senát* is of the opinion that the Commission had not demonstrated the need for the European Public Prosecutor's Office to be also competent for non-cross-border offences.

### *2.6.1. Scope and exclusive character of the competence*

Whilst the Commission understands the concerns raised by the national Parliaments, it recalls that Article 86 TFEU encompasses all cases of Union fraud with no distinction between national and cross-border cases. The main argument for including all cases in the European Public Prosecutor's Office's competence is that this is the most effective way of ensuring a consistent investigation and prosecution policy across the Union and to avoid parallel action at Union and national level, which would lead to duplication and a waste of precious resources. Also, without at least knowing of all cases, it would be difficult for the European Public Prosecutor's Office to identify cross-connections between suspects and cases in different Member States. Limiting its competence to some cases, e.g. serious or cross-border cases, would not only reduce its added-value but also call into question the Union's competence in this matter.

The need to grant the European Public Prosecutor's Office exclusive competence for all crimes affecting the financial interests of the Union, including non-cross-border cases, arises out of the nature of the crimes in question, which have an intrinsic Union dimension. It implies Union-level steering and coordination of investigations and prosecutions because these criminal offences affect the Union's own financial interests.

However, the exclusive competence of the European Public Prosecutor's Office would not mean that national authorities would be excluded from dealing with the cases handled by it.

Given its decentralised structure, the European Public Prosecutor's Office would investigate offences with the active assistance of national law enforcement authorities, and would bring prosecutions to national courts through the European Delegated Prosecutors located in the Member States.

Finally, the HU *Országgyűlés* objects to the exclusive competence granted to the European Public Prosecutor's Office by Article 11(4) of the proposal because, in its view, Article 86 TFEU does not provide an exclusive competence to the European Public Prosecutor's Office. The Commission considers, in contrast, that even if the Treaty does not enshrine Article 86 TFEU as an exclusive competence, as stated above, that does not mean that the Regulation establishing the European Public Prosecutor's Office cannot lawfully grant it, as a matter of secondary law, an exclusive competence to investigate and prosecute criminal offences against the Union's interests.

#### 2.6.2. *Ancillary competence*

The ancillary competence of the European Public Prosecutor's Office enshrined in Article 13 of the proposal ensures an effective prosecution, allowing the Office to investigate and prosecute offences which are inextricably linked to an offence affecting the financial interests of the Union, while the latter is preponderant. In practice, illicit conduct against the financial interests of the Union may be closely associated with other offences under national law (e.g. forgery of documents). In those cases a joined prosecution is in the interest of the effective administration of justice, saving time for both the prosecution authorities and the courts, whilst the suspect only needs to stand trial once. The criteria are strict: the different crimes must be inextricably linked, they must be based on identical facts, and for the European Public Prosecutor's Office to be competent the Union crime must be preponderant. In other cases, national authorities would be competent to investigate and prosecute the crimes affecting the financial interests of the Union, together with the other linked and preponderant national offences. The European Public Prosecutor's Office and the national prosecution authorities should consult each other in accordance with Article 13(3) of the proposal to determine who is competent in the light of the criteria above.

The Commission therefore emphasises that the rule concerning ancillary competence in Article 13 of the proposal does not exclusively favour the competence of the European Public Prosecutor's Office to the detriment of national competence, but may work in both directions, depending on the factor of preponderance. The main reason for dealing with ancillary competence is that quite often the crimes affecting the financial interests of the Union are inextricably linked to other crimes that do not affect those interests. Without this ancillary rule concerning such mixed cases, parallel investigations and prosecutions concerning inextricably connected crimes could happen regularly and could thus seriously undermine the efficiency of anti-fraud activities. Moreover, as far as parallel proceedings concern the same offence, once a final decision is taken in one case the connected action would need to be closed immediately, according to the principle that no-one should be prosecuted twice for the same offence (*ne bis in idem*). The relevant provision concerning ancillary competence ensures that such ineffective action would not occur.

The Commission therefore considers that the nature and the scope of the competences of the proposed European Public Prosecutor's Office are compatible with the principle of subsidiarity.

### **3. CONCLUSION**

In the light of the above, the Commission concludes that its proposal complies with the principle of subsidiarity enshrined in Article 5(3) TEU and that a withdrawal or an amendment of that proposal is not required. The Commission therefore maintains it. During the legislative process the Commission will, however, take due account of the reasoned opinions of the national Parliaments.