

Initial appraisal of a European Commission Impact Assessment

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

Impact Assessment (SWD (2013) 275 final, SWD (2013)274 final (summary)) for a Commission Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office (COM (2013) 534 final).

- **Background**

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment accompanying the above proposal submitted on 17 July 2013.

Every year, at least several hundred million euros of EU funds are fraudulently diverted from their intended purpose, only a small fraction of which are ever recovered. Despite the significant potential damage of such fraud to EU financial interests, offences are not always detected, investigated and prosecuted by national authorities. Enforcement efforts are fragmented and cases with a cross-border dimension often escape attention. Despite intensified efforts of EU bodies such as Eurojust, Europol and the European Anti-Fraud Office (OLAF), the Commission considers that current levels of information exchange and coordination are insufficient to address the problems. Eurojust and Europol have a general mandate to facilitate information exchange and coordinate national criminal investigations and prosecutions, but lack the power to carry out acts of investigation or prosecution themselves. OLAF has a mandate to investigate fraud and illegal activities affecting the EU, but its powers are limited to administrative investigation. Prosecuting offences against the EU budget is currently within the exclusive competence of Member States. No Union authority exists in this area and there is no centrally placed body that can ensure continuity in the investigation and prosecution process throughout the EU.

Discussions on the establishment of a European Public Prosecutor's Office (EPPO) have been going on for over a decade but views have remained divided. Article 86 TFEU explicitly foresees that the Council, acting unanimously and after obtaining the consent of the European Parliament, 'may establish a European Public Prosecutor's Office from Eurojust', and this has now provided the specific legal base required for the creation of such a body.

It should be noted that in its resolution of 3 July 2013 on the Annual Report 2011 on protection of EU financial interests, Parliament welcomed the anticipated proposal on the creation of the EPPO but due to concerns about the effectiveness and internal functioning of OLAF urged the Commission 'to formulate practical solutions to remedy shortcomings before the end of 2013'

and called 'on the Commission and the Council, in the meantime, to stall all discussions and decisions on the introduction of the European Public Prosecutor's Office'. In its resolution of 23 October 2013 on organised crime, corruption and money laundering (P7_TA(2013)0444), it called for the prompt adoption of the proposals on the establishment of the EPPO and also on Eurojust, stressing that it was crucial that the EPPO be supported by a clear procedural rights framework and that the offences over which it would have authority be clearly defined.

• Identification of the issue at stake

The fundamental issue at stake is the disturbing level of fraud, corruption and other offences affecting the Union's budget, the inadequacy of current structures and policies in responding to the problem and the lack of any European enforcement structure and underlying common European prosecution policy. The Commission considers that the approach to criminal investigation and prosecution of such offences across the Member States is extremely fragmented and uneven, with levels of deterrence, detection, investigation and prosecution of cases varying enormously from one Member State to another. It identifies a 'significant gap in the enforcement cycle' which it suggests could best be addressed by the creation of a European Public Prosecutor's Office. The difficulty lies in establishing the best institutional set-up of such a body and the integration of its actions within national judicial systems.

Objectives of the legislative proposal

The Commission proposal seeks to establish a European Public Prosecutor's Office, as foreseen by Article 86 TFEU, and to define its competences and procedures. It complements an earlier proposal which defines the criminal offences and applicable sanctions¹. The specific objectives are to contribute to the strengthening of the protection of the Union's financial interests and further development of an area of justice, to establish a coherent European system for the investigation and prosecution of offences affecting the Union's financial interests, to increase the number of prosecutions leading to more convictions and recovery of fraudulently obtained EU funds, to enhance deterrence and to ensure close cooperation and effective information exchange between the European and national authorities. The proposal is subject to the consent procedure.

• Range of the options considered

The IA considers seven policy options of which the last four all involve the creation of an EPPO:

- 1) *Retention of the status quo*. There would be no new action at EU level and offences would continue to be prosecuted solely at national level.
- 2) *Non-regulatory actions only*. No legislative action would be taken at EU level and no new bodies would be set up. However, national and EU level actions would be strengthened through non-legislative measures.
- 3) *Strengthening the powers of Eurojust*. Eurojust would be given new powers to trigger investigations throughout the EU. Eurojust and its national members would have the right to

¹ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (COM (2012) 363 final)

give binding instructions to national prosecution services to initiate investigations and propose prosecutions in Member States in accordance with Article 85 TFEU.

4a) *Creation of an EPPO unit within Eurojust.* Eurojust would become the EPPO's 'parent agency'. An EPPO unit would have exclusive jurisdiction over cases affecting the EU's financial interests and would be composed of prosecutors and investigators specialised in financial crimes.

4b) *Creation of a College-type EPPO.* In a similar way to that in which Eurojust is organised, the EPPO would be organised in the form of a College of national members appointed by the Member States. The College would take majority decisions as regards investigations and prosecutions of offences affecting the EU's financial interests throughout the EU.

4c) *Creation of a decentralised EPPO.* The EPPO would consist of a central EU Prosecutor's Office assisted by European Delegated Prosecutors located in the Member States and integrated in national systems, having full prosecutorial authority under national law. The central office would have the hierarchical power of instruction over the European Delegated Prosecutors. The EPPO would cooperate with national police and prosecution services for carrying out its tasks, and would be responsible for bringing cases to trial. This is the option favoured by the Commission.

4d) *Creation of a centralised EPPO.* This would entail the creation of a central EPPO possessing the full legal and practical capacity required to conduct investigations and prosecutions of the relevant offences, without depending on the national prosecution services.

• **Scope of the Impact Assessment**

The length of the Impact Assessment (58 pages + 51 pages of annexes and a 10 page Executive Summary), is due to the fact that much of the information provided concerns not so much the impact of the proposal and the options considered in its preparation, but rather the impact of the problem of EU fraud itself. It is of course difficult to assess the likely impact of a proposed solution without having an idea of the scope of the perceived problem it seeks to address. However, the concentration on this aspect tends at times to distract from the essential question of the potential impact of the solutions proposed.

The IA explains that it has not been possible to calculate the real social costs or impacts of EU fraud, such as effects on quality and delivery of goods and services, market distortions and trust in the legitimacy of the EU and its institutions. The calculation of the impact of the different offences is therefore limited to an estimate of the direct costs to the EU budget. However, the IA warns that even these figures should be viewed with caution as they are necessarily based on assumptions which may or may not be true. Annex 3 provides a detailed overview of the difficulty of estimating the extent of fraud against EU finances and the potential size of the 'dark figure' of suspected fraud.

Against this background of unknowns, the IA produces a comparative assessment of the implications of the various options considered, on the basis of their effectiveness in meeting the policy objectives; their impact on fundamental rights; their feasibility; their impact on the legal

systems of the Member States and on existing EU institutions, and their estimated financial costs and benefits.

With regard to fundamental rights, the IA provides a clear assessment of the likely impact of each policy option on fundamental rights issues. The report recognises that the establishment of the EPPO 'may raise several issues as regards the Charter [of Fundamental Rights of the EU], notably the right to privacy, protection of personal data, property and liberty'. Given the extent and detail of the proposal's Article 26 on investigation measures, this might be a conservative conclusion, although the IA does stress that the measures foreseen under the preferred option would be comparable to those used in national investigations and that it would be necessary to provide for a right to judicial control over the EPPO's investigative powers and to judicial review of its decisions. It is not clear if any of the respondents to the Commission's questionnaires were experts in this particular field or if they were explicitly consulted.

As far as impact on the legal systems of the Member States is concerned, the aspect of the very practical financial and administrative implications for Member States of a potentially massive increase in case-loads, combined with the adaptations necessary to cope with the additional layer of authority represented by the EPPO, might have benefitted from more detailed attention. It is not entirely clear why the impact on Member States' legal systems of option 4c is projected only as 'medium', for example, when the impact of option 4d) is projected as 'high', or of having 'at least a perceived high impact' even though many of the implications appear fundamentally similar.

With regard to the impact on existing EU institutions, the IA recognises that the sharing of administrative and functional services with Eurojust would have to be a part of any of the options entailing the creation of an EPPO, and that this would also involve using some of OLAF's resources. However, some of the institutional arguments put forward against certain policy options raise their own questions. For example, the suggestion that 'conflicts of interest and differences in working culture between the EPPO Unit and Eurojust' might limit the political feasibility of option 4a seems to pre-suppose that the EPPO Unit would adopt a different working culture to Eurojust, despite being created as a unit within it, but there is no real explanation as to why this might be.

The IA points out, in relation to option 4d, that concerns have been raised about the effectiveness in practice of a 'foreign body' investigating offences in Member States and the likely reluctance of national authorities to cooperate fully. There is no explanation as to why this would not also be a concern with regard to other options, notable the Commission's preferred option, 4c.

A related institutional aspect which the IA might have examined would have been the extent to which the various options reflect the wording of article 86 (1) TFEU which states that the Council 'may establish a European Public Prosecutor's Office from Eurojust'.

For the purposes of assessment of the individual options in respect of financial costs and benefits, the IA takes as a basis an assumption that about 3 billion euros per year could be at risk from fraud, but it recognises that the true figure cannot be calculated precisely. This is due to weaknesses in the available data, differences in interpretation of what constitutes fraud, different reporting procedures and the difficulties inherent in measuring the scale of undetected criminal activities.

It also works on the assumption that improvements in the rate of recovery of EU funds will be roughly proportionate to the increases in the number of convictions. As for deterrence, it has been assumed that a 10 per cent increase in the number of convictions would lead to a 1 per cent decrease in the annual damages suffered.

Because of the impossibility of establishing the exact size of the cause and effect relationship, it is stressed that estimated financial benefits presented for each option are not intended as precise forecasts, but should rather be understood as indications of the likely *relative scale* of the effects that they could generate. While the assumptions therefore have the merit of allowing the various options to be compared with one another, they nevertheless raise their own questions with regard to the lack of reliable, quantifiable data, notably with a view to ex-post impact assessment and evaluation.

Other more specific uncertainties, which the IA recognises were not examined despite the fact they could have a significant impact on the accuracy of any cost-benefit assessment, include the location of the future EPPO and the consequent costs involved and, even more importantly, the number of participating Member States.

As far as the latter point is concerned, the IA is based on an assumed participation of 27 Member States (excluding Denmark). Denmark, the United Kingdom and Ireland all benefit from special arrangements giving them the option of deciding whether or not they wish to participate in legislative procedures in the area of freedom, security and justice. In addition, the Treaty provides for the enhanced cooperation procedure to apply if unanimity cannot be found in Council on the question of the EPPO, meaning that a considerable number of countries might not participate in the final outcome. This could have major implications, not only for aspects such as the cost-benefit analysis, but also for the practical functioning of the proposed EPPO which might have to deal with cross-border issues under an arrangement where some Member States would be participating and others not, and also for Eurojust's activities.

The IA explicitly states that it has not attempted to analyse what the specific impact of the various options would be under a different legislative procedure and that without detailed information it would be impossible to consider the implications if other countries decided not to participate. As this is a real possibility, it would nevertheless have been helpful and more complete, if the IA had attempted some alternative scenarios based on numbers of countries participating.

- **Subsidiarity / proportionality**

The IA points out that the obligation to counter fraud and any other illegal activities affecting the financial interests of the Union (Article 325(1) TFEU) applies equally to the Union, its institutions and to the Member States. It goes on to state that 'as the EU is best placed to protect its own financial interests...it is also best placed to ensure the prosecution of offences against these interests'. It argues that OLAF's annual reports provide clear indications that criminal investigations limited to the national territory do not allow for effective and equivalent protection of the Union's financial interests with the degree of protection varying strongly from one Member State to another.

The IA claims to have taken the principle of proportionality into consideration in the definition of each of the options. It argues that this principle 'should leave as much scope for national decision as possible' and 'can also be understood to imply decentralisation'. This being so, the reference under the preferred policy option 4c to a 'central office [having] hierarchical power of instruction over national prosecutors' might seem slightly contradictory.

A large number of national parliaments have voiced serious concerns about the application of the principle of subsidiarity, with 14 national parliaments having issued Reasoned Opinions during the consultation procedure. This has triggered the procedure foreseen under article 7(2) of Protocol No 2 of the Treaty which provides that 'where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments ...the draft must be reviewed'. On 27 November 2013, following an in-depth review of the reasoned opinions issued, the Commission approved a Communication setting out its reasons for maintaining its proposal. It explains that the review found that the proposal complies with the principle of subsidiarity enshrined in Article 5(3) TFEU, since Member States' action would be insufficient and Union action would bring added value. The Communication also recalls that the TFEU expressly provides for the possibility of establishing the EPPO (Article 86). Lastly, the Communication indicates that the Commission will take due account of the reasoned opinions of the national parliaments in the legislative process.

- **Budgetary or public finance implications**

Annex 4 of the IA sets out the methodology and provides a very extensive cost-benefit analysis of the various options, with estimates of direct and indirect costs at both EU and Member State level. While costs concerning issues such as staffing and infrastructure can perhaps be estimated with some accuracy, it is the broader costs and benefits in terms of the financial impact of fraud that cause difficulties. Yet it is only by evaluating financial losses due to fraud that the ultimate effectiveness of any such measure can be assessed. The IA itself sensibly cautions that the cost-benefit analysis is 'very much "pushing the limits" of what is possible' due to the fundamental problem of the lack of reliable and precise data. According to the IA, 'there are no reliable estimates of the loss of European taxpayer money due to criminal conduct related to the expenditures of the EU budget' and 'intuitive estimates of losses by offences against the EU budget have ranged over the last decades from 1 to 20% of the overall EU budget'. Key parts of the analysis in this respect are therefore based on assumptions which may or may not be close to the truth and which would make any future cost-benefit evaluation extremely difficult to undertake.

- **SME test / Competitiveness**

SMEs would not be directly affected by the creation of the EPPO.

- **Simplification and other regulatory implications**

The proposed regulation is part of a body of measures aimed at protecting the financial interests of the EU. In particular, the proposals on the fight against fraud to the Union's financial interests by means of criminal law and on the reform of Eurojust and OLAF respectively would need to be adapted to ensure coherence.

- **Relations with third countries**

The IA notes that the different options identified will all have to take account of the fact that the EPPO will need to cooperate with the authorities of third countries, since crimes affecting the Union's financial interests are also committed outside the EU. It considers that only option 4a (creation of an EPPO unit within Eurojust) would present some advantages in this respect, since the EPPO would be able to profit directly from Eurojust's existing cooperation agreements. Under the other options, the EPPO would need to rely on specific future legal instruments under which cooperation with third countries could take place. The possibility for it to use existing cooperation agreements would need to be specifically regulated.

- **Quality of data, research and analysis**

The IA refers to a large body of institutional documents, studies and independent analyses which have been produced in the course of the debate over the last decade. In addition, two external studies were carried out on behalf of the Commission in order to examine a number of outstanding technical, legal and political issues with a view to preparing the Impact Assessment. The first was on the impact of the different policy options; the second was on the impact of strengthening administrative and criminal law procedural rules. Both were carried out by ECORYS. These studies included field research in a number of Member States.

As far as the quality of the data is concerned, as mentioned earlier, the Commission itself is at pains to point out that 'there are no reliable estimates of the loss of European taxpayer money due to criminal conduct related to the expenditures of the EU budget' and that the impact assessment is necessarily based on assumptions.

- **Stakeholder consultation**

A number of European level meetings and discussions took place in 2012/2013 involving public prosecutors, defence lawyers, experts and high level representatives from academia, EU institutions and Member States. There have also been numerous bilateral consultation meetings with Member State authorities. Two questionnaires were distributed, one to justice professionals and another to the general public, the results of which appear at Annex 1 of the IA. In all, 17 national prosecution services, as well as Eurojust, and 25 individual practitioners or associations replied to the on-line consultation. On the key question as to whether there would be an added value in establishing a specialised European Public Prosecutor's Office with EU-wide competences, positions ranged from 'veiled opposition' to clear support. For several respondents from national prosecution structures, as well as for Eurojust itself, the optimal solution would be first to improve the effectiveness of existing instruments and bodies such as Eurojust, OLAF and Europol.

Significantly, the replies given to the question on the preferable design for the EPPO showed that the terms 'centralised' and 'decentralised' were subject to different interpretations. This being the case, and given that the concept of decentralisation is key to the preferred option of the Commission, and to its interpretation of the principle of proportionality, it is surprising that it did not seek to find an alternative term to distinguish between the two main alternatives it suggests for the EPPO and to remove the ambiguity.

The impact assessment of each of the options is systematically introduced by a section on stakeholder views. There is not always a clear identification of the specific stakeholder groups concerned in each case. Sometimes they are not identified at all, elsewhere there is specific reference to the views of prosecutors, experts, Member States, and little detail as to the exact weighting of views expressed. Terms such as 'few', 'several', 'some', 'many', do not necessarily reflect the degree of support, nor the type of stakeholders concerned. Some clarification on these points is however provided at Annex 1 in the summaries of the replies to the questionnaires, but it is not always clear if these are the same respondents as those referred to in the body of the text.

The description of the stakeholders' views on option 1 (the status quo scenario) appears contradictory, stating that '[n]one of the stakeholders consulted consider that this option would address the problem' and yet going on to say that 'some consulted experts consider that the necessary legal framework is already in place, and that the difficulties encountered....are rather of a practical nature'. Similarly, with regard to option 3 (a strengthened Eurojust), the IA states that 'none of the stakeholders consulted find this opinion would be a fully effective contribution to the protection of the Union's financial interests' and yet previously it states that 'a few Member States would welcome a strengthened Eurojust in this sense'.

- **Monitoring and evaluation**

The Commission envisages carrying out a specific statistical study two to four years after the set-up of the EPPO is completed. Why it is not possible to set a more precise deadline is not explained. The proposal provides that at the latest five years after the start of the application of the Regulation, the Commission will present an evaluation report to Parliament and Council. This report will also contain its findings on the feasibility and advisability of extending the competence of the EPPO to other criminal offences in accordance with Article 86(4) TFEU. If the Commission were to produce its statistical study two years after set-up of the EPPO, a further three years' wait for an evaluation report to Parliament and Council seems excessive.

- **Commission Impact Assessment Board**

The Commission IA Board issued a negative opinion on 12 April 2013 following which the IA was revised and re-submitted. The second opinion of the Board on the draft IA, issued on 23 April 2013, was positive but called for strengthening in a number of respects, some of which, but not all, appear to have been addressed in the final version of the IA.

In particular, the Board asked for better explanation as to why several horizontal issues such as rules on cooperation between authorities and procedures to be applied when handling offences, are no longer addressed. The IA explains that several horizontal issues which were not considered to affect the assessment and comparison of the options were taken out. However, given the importance of these issues in the functioning of the EPPO, it might have been useful to leave this information in, particularly as another horizontal issue, namely cooperation with third countries, was retained, despite the fact that it was not considered to be a point that would influence the final decision.

The IA Board considered that the report should identify a set of quantifiable operational objectives against which the success of the new EPPO could be assessed. It also found that the report should test the robustness of the estimates of benefits through sensitivity analyses (i.e. variations in the assumed overall levels of EU fraud). Annex 3 on the Dimension of Crime affecting the EU Budget does contain a number of 'what if' scenarios, but this approach does not appear to have been transferred to the impact analysis of the policy options which are all based on one set of assumptions. Annex 4 of the IA points out that while the cost-benefit analysis has focussed on the situation in which the full potential of the EPPO will be realised following pre-defined working assumptions, the sensitivity of the outcomes has been assessed by using a more conservative set of assumptions in order to test the robustness of the analysis.

Coherence between the Commission's legislative proposal and IA

The legislative proposal of the Commission reflects the recommendations expressed in the IA. However, Article 13 of the proposal appears to suggest a movement potentially to go beyond anything covered in the IA, in that it refers to possible 'ancillary competences' which would allow the EPPO in certain cases to be competent for criminal offences other than those purely affecting the financial interests of the Union. According to the IA, the possibility of setting up an EPPO with a large scope of competence i.e. including serious cross-border crimes, was a policy option that was discarded at an early stage on the grounds a) that fraud affecting the EU budget is a unique problem, and b) that Article 86 TFEU 'does not permit the scope of the EPPO to encompass all forms of crime from the outset without a unanimous decision by the European Council'². There is arguably some contradiction here.

² Article 86 (4) TFEU provides that the European Council, acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission, may, at the same time as it establishes the EPPO or subsequently, adopt a decision 'to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension'.

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This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

<http://www.europarl.europa.eu/activities/committees/studies.html>

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