



12.11.2013

NOTICE TO MEMBERS

(105/2013)

Subject: Reasoned opinion of the Hungarian Parliament on the proposal for a Council Directive¹ on the establishment of the European Public Prosecutor's Office (COM(2013)0534 – 2013/0255(APP))

Under Article 6 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, any national parliament may, within eight weeks from the date of transmission of a draft legislative act, send the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Under Parliament's Rules of Procedure the Committee on Legal Affairs is responsible for compliance with the subsidiarity principle.

Please find attached a reasoned opinion by the Hungarian Parliament concerning the above proposal.

¹ (Sic – translator's note)

Report

concerning the examination, with a view to the application of the principle of subsidiarity, of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office and concerning the existence of the conditions for the adoption of a reasoned opinion

1. Legislative background to the examination in the light of the subsidiarity principle

The subsidiarity principle requires decisions always to be taken at the lowest possible level.

Pursuant to Article 5¹ of the Treaty on European Union (hereafter referred to as the TEU), a proposed EU measure accords with the subsidiarity principle if the action concerned cannot be taken at Member State level or if its objective can be attained more effectively at EU level and the EU measure creates added value.

Pursuant to Protocol No 2 annexed to the Lisbon Treaty², the national Parliament of an EU Member State has the right to examine European Union legislative proposals – in accordance with a procedure laid down by law – for compliance with the principle of subsidiarity. If the Parliament chamber concerned finds that the proposal breaches the principle, it may forward a reasoned opinion to the EU legislators within eight weeks of submission of the proposal. If a set number of reasoned opinions are received – the number in question being laid down in Protocol No 2 – the body submitting the proposal, i.e. the European Commission, must review the legislative proposal and may ultimately withdraw it. The aim of the procedure is to make it possible for national Parliaments, where necessary, to prevent the EU legislative institutions from exceeding the powers conferred on them.

The Committee on European Affairs of the Hungarian Parliament may examine an EU legislative proposal in the light of the application of the principle of subsidiarity pursuant to Article 71(i)(2) of Law no XXXVI of 2012 concerning the Hungarian Parliament and Article 134/D(i)(2) of Hungarian Parliament Decision 46/1994 of 30 September 1994 concerning certain provisions of the Rules of Procedure (hereafter referred to as the HHSZ).

If the Committee on European Affairs establishes that a legislative proposal breaches the subsidiarity principle, it submits to the Hungarian Parliament a report on the existence of the conditions for adoption of a reasoned opinion, accompanied by a proposal for a decision concerning adoption of the report. Pursuant to Article 134/D(3) of the HHSZ, Parliament decides in plenary within 15 days on the adoption of the report and of the proposal for a decision. The eight-week time limit within which a reasoned opinion must be forwarded is objective, so that it is desirable for the Hungarian Parliament to abide by it.

¹ Please see the annex for the European legislative background to the application of the subsidiarity principle, the procedure applicable and its possible effects.

² Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Euratom Treaty

2. Legal basis, objective and principal provisions of the proposal for an EU Regulation being examined for compliance with the principle of subsidiarity¹

On 17 July 2013, the European Commission adopted its proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM (2013)534; 2013/0255(APP)] (hereafter referred to as 'the proposal'). The legal basis for the proposal was Article 86 of the Treaty on the Functioning of the European Union (hereafter referred to as the TFEU)², which stipulates that the Council, acting with the unanimous support of the Member States, may establish a European Public Prosecutor's Office to bring prosecutions for crimes affecting the financial interests of the Union.

The main aims of the proposal are to establish a coherent European system for investigating crimes to the detriment of the Union's financial interests and prosecuting the offenders, to make the procedure more effective and successful, and to improve recovery of fraudulently obtained Union funds. According to the proposer, the establishment of the new model is justified by the rather uneven record in detecting the losses to the EU budget due to fraud, valued at an average of €500 m per annum, and in detecting breaches of the law.

On the basis of the proposal, in relation to 'crimes affecting the financial interests of the Union', the European Public Prosecutor's Office would be vested with **exclusive powers** to investigate, prosecute and bring to judgment perpetrators of, and accomplices in, offences. In this respect, the EU would be characterised as a single legal area, where the European Public Prosecutor's Office could act without needing to resort to mutual assistance in criminal matters³.

On the basis of a decentralised structure, the European Public Prosecutor's Office would investigate and prosecute in the Member States by means of the Delegated European Prosecutor. The Delegated ('two-hatted') European Prosecutor, embedded in the judicial – public prosecution – system of the Member State, would pass on and coordinate the instructions of the European Public Prosecutor's Office on the spot.

3. Examination in the light of the subsidiarity principle by the Committee on European Affairs

At the Committee on European Affairs' meeting of 23 September 2013, representatives of the European Commission and the Ministry of Public Administration and Justice provided information about the aim and main elements of the proposal. The Committee on European

¹ The Hungarian version of the proposal for a regulation may be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013.0.cvr-i4:FIN:HU:PDF>

² '(1) In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament. (...)

(2) The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

(3) The regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions. (...)

³ With the exception of Denmark and, depending on their decisions, probably the United Kingdom and Ireland.

Affairs observed that it was legally possible to check for compliance with the subsidiarity principle, as the eight-week time limit within which a reasoned opinion must be forwarded would expire on 28 October 2013.

At its meeting of 14 October 2013, the Committee on European Affairs assessed whether the proposal complied with the subsidiarity principle, and expressed the following concerns:

- The Committee on European Affairs found that Article 86 TFEU provided the legal basis for the establishment of the European Public Prosecutor's Office. At the same time, the Committee on European Affairs considered that the legal basis conferred on the European Public Prosecutor's Office general powers and, contrary to the proposal [Articles 11(4) and 14 of the proposal], did not refer to the exercise of the powers as being exclusive.
- The Committee on European Affairs supported the aim of the proposal, while stressing that the planned arrangements must not disproportionately restrict the Member States' sovereignty in criminal matters and compromise the independence of the Member States' public prosecutions departments. The Committee on European Affairs took the view that the aim of the proposal would be served by the adoption of the European Investigation Order, or by reinforcement of the existing instruments for cooperation in criminal matters, by promoting closer cooperation between the Member States' investigating authorities and public prosecutions departments, coordinated by the European Public Prosecutor's Office.
- The Committee on European Affairs agreed that, in the interests of more effective action, measures needed to be taken, but did not consider it to have been established how the proposed model for prosecutions would be capable of doing so. It was precisely the supranational organisational model that would lead to numerous practical problems, particularly with regard to ancillary competence [Article 13 of the proposal], determination of jurisdiction [Article 27(4) of the proposal] and admissibility of evidence [Article 30 of the proposal], as well as the fact that some EU Member States would participate in the European Public Prosecutor's Office while others did not, and the relationship between the European Public Prosecutor's Office and the Member States' public prosecutions departments.
- The Committee on European Affairs stressed that the empowerment of the European Public Prosecutor's Office to exercise its power directly, or the reallocation of cases on the basis of the concept of 'specific circumstances', a concept which did not readily lend itself to interpretation [Articles 6(5) and 18(5) of the proposal], foreshadowed a centralised structure which was contrary to decentralisation and which would not generate any genuine added value but would only render implementation uncertain. The exclusive power of instruction vested in the European Public Prosecutor's Office [Article 6(5) of the proposal], for its part, would call into question the possibility for the Delegated Prosecutor to function as an officer embedded in the Member States' legal and institutional systems.

While examining the proposal in the light of subsidiarity, the Committee on European Affairs drew attention to the following points:

- So far, no EU Criminal Code or Code of Criminal Procedure has been adopted: all that exists is a few basic procedural principles and guarantees and a minimum harmonisation of certain situations. Consequently, the concept of the 'single legal area' referred to in Article 25(1) of the proposal likewise cannot be interpreted in the light of the results achieved to date in cooperation in criminal matters.

- The crimes concerned – fraud against the financial interests of the EU, and associated offences – have not been the subject of EU harmonisation, the proposal for a directive on the fight against fraud against the Union's financial interests by means of criminal law¹ has not so far been adopted: it is not yet clear exactly which offences would fall within the European Public Prosecutor's Office's remit.
- The proposal [impact assessment, 3.2.2.] sees European added value in the virtually automatic increase in the prosecution and conviction rates in the Member States, while disregarding the fact that there are Member States where the prosecution rate in such cases is unquestionably high.

4. Opinion of the Committee on European Affairs regarding the application of the subsidiarity principle

The Committee on European Affairs considers that:

the exclusive competence of the European Public Prosecutor's Office [Articles 11(4) and 14 of the proposal] would exceed the powers provided for in Article 86 TFEU, as the latter does not guarantee exclusive competence for the European Public Prosecutor's Office;

the supranational model of the European Public Prosecutor's Office would disproportionately restrict the **sovereignty** of the Member States in the field of the criminal law;

the assignment of exclusive powers of instruction to the European Public Prosecutor's Office [Article 6(5) of the proposal] would call into question the scope for Delegated Prosecutors to operate within a Member State's prosecution system;

the proposal does not sufficiently demonstrate that the procedure involving a European Public Prosecutor's Office would **genuinely be more effective than the procedure which applies in the present situation**; numerous executive obstacles would be presented by the provisions concerning ancillary competence [Article 13 of the proposal], the power to reallocate cases [Article 18(5) of the proposal], determination of the jurisdiction of trial [Article 27(4) of the proposal] and the admissibility of evidence [Article 30 of the proposal];

the proposal does not sufficiently demonstrate the true added value of Union action.

On the basis of the above, the Committee on European Affairs considers that the proposal for a Regulation on the establishment of the European Public Prosecutor's Office [COM(2013)534; 2013/0255(APP)] breaches the subsidiarity principle.

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). The Hungarian version of the proposal for a directive may be accessed at: http://ec.europa.eu/anti_fraud/documents/pif-report/pif_proposal_hu.pdf

Annex

The procedure for examining proposals in the light of the subsidiarity principle and its possible effects

Article 5 TEU defines the principle of subsidiarity as follows:

‘(3) 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.

(4) Under the principle of proportionality, the content and form of Union action should not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.’

Examinations of proposals with a view to applying the subsidiarity principle are provided for as follows in Article 6 of Protocol No 2 annexed to the Lisbon Treaty:

‘Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. (...)’

Law no XXXVI of 2012 concerning the Hungarian Parliament and the HHSZ, taking as a basis the above provisions, regulate examinations in the light of subsidiarity. On this basis, the Committee on European Affairs is empowered to examine EU legislative proposals with a view to applying the subsidiarity principle.

If it does not find the principle to have been breached, the committee stage of the procedure comes to an end.

If the Committee on European Affairs considers that the EU legislative proposal breaches the subsidiarity principle, then, pursuant to Article 134/D(i)(2) of the HHSZ, it submits a report on the existence of the conditions for the adoption of a reasoned opinion and a proposal for a decision adopting it, on which the Hungarian Parliament takes a decision within 15 days.

When the report on the existence of the conditions for the adoption of a reasoned opinion has been adopted, the Speaker of Parliament immediately forwards the reasoned opinion to the Presidents of the European Commission, the Council and the European Parliament and at the same time informs the government of this.

The effect of the reasoned opinion depends on how many of the Member States’ Parliaments decide within the eight-week time limit that the particular EU proposal breaches the subsidiarity principle.

The Parliaments of the 28 Member States have two votes per Member State (a total of 56 votes) in this procedure. The reasoned opinions may particularly have a material impact on

EU decision-making if – depending on the particular EU legislative procedure at issue – one quarter, one third or a majority of the Parliaments of the Member States find the subsidiarity principle to be breached. Under the ‘yellow card procedure’ pursuant to Article 7 of Protocol No 2, if one third of the Parliaments of the Member States (19 votes) decide that a particular draft breaches the subsidiarity principle, the draft must be reviewed. After such review, the body submitting the draft may decide to maintain, amend or withdraw it.

(Note: since 1 December 2009, the one-third threshold has been attained in only one case. The result was that the EU proposal was withdrawn.)

The ‘orange card’ procedure, which applies when a majority of the Parliaments of the Member States (29 votes) decide that a particular draft breaches the subsidiarity principle, is confined to legislative proposals under the ‘normal’ legislative procedure (formerly known as ‘codecision’): it initially requires a review but in the last instance allows not the body which submitted the proposal but the Union legislator – the Council or the European Parliament – to review whether the subsidiarity principle is complied with, after which it may reject the proposal by a majority vote. (This has not so far happened.)

In the case of the EU proposal at issue here, the legal basis in EU law is Article 86 TFEU, which requires unanimity in the Council for its adoption: the EU legislative procedure applicable is a special legislative procedure. The orange card procedure is not applicable in such cases, and the threshold for the yellow card procedure here (according to the provision to which Article 7(2) of Protocol No 2 refers) is one quarter, i.e. 14 votes. If this threshold is reached, the European Commission must review the draft and may then maintain, amend or withdraw it.