Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office

COM(2013) 534 final
(2014/C 170/14)

Rapporteur: Mr Lucan


The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 20 November 2013.

At its 494th plenary session, held on 10 and 11 December (meeting of 11 December), the European Economic and Social Committee adopted the following opinion by 176 votes to 7 with 13 abstentions.

1. Conclusions and recommendations

1.1 The Committee welcomes the Commission’s initiative. The establishment of a European Public Prosecutor’s Office is an important step in creating new legal mechanisms to protect both the EU’s financial interests and Europeans’ financial contributions to the EU budget.

1.2 While the Committee considers that the EU’s financial interests should be defended, the consistency of the EU criminal law system would be better ensured if the regulation defined (1) with accuracy and precision not only the terminology used but especially the offences in question that affect the EU’s financial interests and which are to be subject to prosecution in the Member States. These definitions should either be incorporated into the regulation or be included by reference to an appendix drawn up along the lines of the Eurojust Regulation (2), and possibly supplemented by a directive. Establishing these definitions could provide an additional regulatory framework for the offences affecting the EU’s financial interests and would ensure compliance with the principle nullum crimen sine lege.

1.3 The Committee believes that the remit of the new European Public Prosecutor’s Office should remain within the limits of the provisions of Article 86(2). In the absence of an impact assessment on cross-border crime, extending the powers of the Office in accordance with Article 86(4) would be premature.

1.4 In proceedings and disputes involving the European Public Prosecutor’s Office, the Committee recommends applying procedural safeguards for suspects in line with the relevant standards under the regulation, in particular the Charter of Fundamental Rights of the European Union, especially the right to a fair trial and the rights of defence, which provide a higher level of protection compared to national legislation. The Committee understands ‘rights of defence’ to include ensuring that the principle of ‘equality of arms’ between the prosecution and the defence is also upheld.

1.5 The Committee proposes extending the remit of the EESC Follow-up committee for the European Instrument for Democracy and Human Rights (EIDHR) to include new competences with regard to monitoring the safeguarding of human rights and fundamental freedoms, particularly in the context of setting up the European Public Prosecutor’s Office, and respecting the rights of persons in criminal proceedings. This committee would cooperate with all of the EESC sections and the other relevant EU and national institutions. The EIDHR committee (3) would work to ensure the monitoring and assessment of respect for human rights in both EU-Member State and EU-third country relations.

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(1) See Articles 2(b), 4(1) and 12 of COM(2013) 534 final, and the explanations given in section 4.1 below: ‘Subject matter, definitions and remit’.

(2) COM(2013) 535 final, Article 3(1): ‘Eurojust’s competence shall cover the forms of crime listed in Annex 1’.

(3) This committee is attached to the REX section. The remit of the SOC section includes active citizenship and the protection of human rights.
1.6 As regards the pre-selection procedure for appointing the European Public Prosecutor, the Committee considers that the panel of experts that is to give an advisory opinion to the Commission should include one representative from each of the following bodies: the EESC, the Committee of the Regions, the EU’s Fundamental Rights Agency, the European Court of Auditors and the Council of Bars and Law Societies of Europe (CCBE). This advisory panel should comprise at least 11 experts.

1.7 The Committee feels that legality and hierarchical subordination should be included among the basic principles underpinning the functioning of the European Public Prosecutor’s Office; these are not mentioned explicitly in the regulation.

1.8 The Committee believes that additional safeguards should be established by the regulation in respect of the exercise of rights and duties of European prosecutors as well as their liability in cases of abuse and serious professional misconduct.

1.9 The Committee would point out that as regards the admissibility of evidence collected and presented by the European Public Prosecutor’s Office in trial courts, where such evidence is admitted without any validation, this may create situations of inequality and violate the ‘equality of arms’ principle. Given that Article 32(5) of the regulation states that people involved ‘[…] shall have all the procedural rights available to them under the applicable national law’, and that this clearly includes procedures for admissibility of evidence, the provisions of this regulation are contradictory, and may lead to violation of the rights of accused persons in criminal proceedings.

1.10 The collection and processing of personal data should be limited to people in respect of whom there are serious grounds for suspecting that a criminal offence affecting the EU’s financial interests has been committed. If that is not the case, this could constitute a serious and disproportionate interference in the privacy of those concerned.

1.11 The Committee believes that setting up the European Public Prosecutor’s Office would help safeguard the financial contributions of Europeans to the EU budget. Harmonised definitions of the offences affecting the EU’s financial interests should be set out in both the proposed regulation and the proposed directive.

2. Background and general comments

2.1 Discussions on setting up a European Public Prosecutor’s Office date back more than a decade (4). In May 2011, the Commission adopted the Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations (5) which contained proposals to improve the protection of EU financial interests.

2.2 An average of around EUR 500 million of suspected fraud was committed in the Member States in each of the last three years, but the actual amount of fraud is estimated to be significantly higher. Only a very small part of the total amount of fraud is ever recovered from offenders: below 10% (6). It is estimated that in the year 2010, 46% of notifications of offences against the EU’s financial interests (at Member State level) stemmed from the public sector and 52% from the private sector. The figures on the areas affected by fraud are as follows: agriculture — 17%; tobacco — 1%; customs — 6%; direct expenditure/purchasing — 11%; EU institutions — 27%; external aid — 19%; Structural Funds — 19%. These figures generally stay the same in the years 2011 and 2012, according to OLAF reports. Such an approach requires specific solutions and measures at the level of EU criminal law policy.

2.3 In July 2012, the Commission proposed a Directive on the fight against fraud to the Union’s financial interests by means of criminal law. This included common definitions of offences against the EU budget, harmonised minimum sanctions (including imprisonment in serious cases) and common statutes of limitation.

2.4 Throughout 2012 and at the beginning of 2013, a number of discussions and meetings took place at European level (7) with regard to establishing the European Public Prosecutor's Office. In his State of the Union address in September 2012, Mr Barroso reiterated the Commission's commitment to making the Office a reality.

2.5 On 17 July 2013, the Commission launched a package of regulations aimed at reforming the structure of Eurojust, enhancing the governance of OLAF and establishing a European Public Prosecutor's Office.

2.6 The main task of the European Public Prosecutor's Office will be to combat crimes affecting the financial interests of the EU. The Office is to be responsible for investigating such offences and bringing prosecutions of suspects before the competent courts of the Member States.

3. Presentation of the proposed Regulation on the establishment of the European Public Prosecutor's Office

3.1 The setting-up of a European Public Prosecutor's Office is not an obligation, but a possibility. Under the Treaty on the Functioning of the European Union (TFEU), the Council 'may establish' the office acting unanimously and after obtaining the consent of the EP. The legal basis and the rules for the setting-up of the European Public Prosecutor's Office are laid down in Article 86 of the TFEU, which states: 'In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulation adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust.'

3.2 Under Article 86(4) TFEU, the European Council may extend the powers of the Prosecutor's Office to include serious crime with a cross-border dimension.

3.3 The provisions of the Regulation on the establishment of the European Public Prosecutor's Office cover: the subject matter and definitions; general rules (status and organisation of the Prosecutor's Office, appointment and dismissal, principles) competence; rules of procedure on investigations, prosecutions and trial proceedings; procedural safeguards; judicial review; data protection; relations of the European Public Prosecutor's Office with the EU institutions; and budgetary implications.

3.4 The judicial review of procedural measures taken by the European Public Prosecutor's Office is a matter for the national courts.

3.5 In accordance with the EU Treaties (8), Denmark is not taking part in the European Public Prosecutor's Office.

3.6 The United Kingdom and Ireland have a so-called 'opt-out' from justice and home affairs policies which means they will not participate — unless they voluntarily and explicitly decide to do so (opt in).

4. Specific comments

4.1 Subject matter, definitions and remit

4.1.1 Although this regulation, in Article 1, 'establishes' the new European Public Prosecutor's Office, its functioning and operation will depend solely on the way in which the Directive on the fight against fraud to the Union's financial interests (9) — which defines the offences and illegal activities affecting the Union's financial interests — is implemented over time. The setting-up of a European Public Prosecutor's Office is useful for protecting the financial contributions of Europeans to the EU budget.

4.1.2 The criminal offences affecting the financial interests of the Union, as covered by the proposed Directive on the fight against fraud to the Union's financial interests (10), are as follows:

i. fraud affecting the Union's financial interests (Article 3);

ii. fraud-related criminal offences affecting the Union's financial interests (Article 4); the provision of information, money laundering, promising or accepting undue advantages on the part of European officials;

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(8) Articles 1 and 2 of Protocol No 22, TFEU.
(9) Referred to in Article 2(b) of the regulation as ‘Directive 2013/xx/EU’.
iii. incitement, aiding and abetting, attempt (Article 5 of the directive specifies only that such action is punishable, without providing definitions).

4.1.3 The Committee considers that it is necessary to legally define these offences expressly and explicitly, and that this could be done by including a paragraph clearly specifying the offences to be investigated by the European Public Prosecutor’s Office. It also believes that minor offences (below a certain amount of damage, for example EUR 10 000) should be excluded from the competence of the European Public Prosecutor’s Office. The Committee believes that all of the definitions included in the directive should be fleshed out and should also appear in the regulation, including the definition of a ‘public official’ (iii) (which extends the definition from the public sector to the private sector). All of the definitions in the proposed regulation and directive should be clearly explained, detailed, harmonised and unified.

4.1.4 In the Committee’s view, another solution to clearly establishing the subject matter, definitions and remit would be to amend certain articles defining the scope of the European Public Prosecutor’s Office (12), by referring to an appendix drawn up along the lines of the Eurojust Regulation (13). This appendix could be supplemented and harmonised by the proposed directive.

4.1.5 The remit of the European Public Prosecutor’s Office should be clear and indisputable. Although the criminal offences that fall within the material competence of the European Public Prosecutor’s Office are to be clarified by reference to the national legislation implementing the relevant EU legislation (Directive 2013/xx/EU), certain conditions governing the existence of these offences established by the regulation (for example, a cross-border dimension, the fact that the EU’s interests are affected, the involvement of EU officials, etc.) would ensure a consistent criminal law policy, in which all types of offences affecting the financial interests of the EU would be dealt with in the same way.

4.1.6 However, the regulation should not include within the remit of the European Public Prosecutor’s Office offences that are subject to criminal investigations by national prosecutors. Furthermore, the regulation should specify the criteria determining ‘preponderance’ (prevalence) where the European Public Prosecutor’s Office has ancillary competence; otherwise, this could lead to different legal interpretations and practices across the Member States.

4.1.7 In the case of cross-border investigations, there may be situations in which certain Member States do not cooperate with the investigation system of the European Public Prosecutor’s Office. Relations between the European Public Prosecutor and the European delegated prosecutors could prevent the same criminal investigation being launched in several Member States. A simple rule could be established regarding the jurisdiction first notified, whereby the investigation is initiated in the Member State in which the judicial authorities were first notified.

4.2 Rules governing the establishment of the European Public Prosecutor’s Office

4.2.1 Although the European Public Prosecutor is to be appointed by the Council with the consent of the European Parliament, the Commission is nevertheless to play an important role in pre-selecting the candidates: it is to ‘submit a shortlist [...] after seeking’ the opinion of a panel set up by it’ (14). As regards the procedure for selecting the European Public Prosecutor, the Committee recommends that the Commission increase the number of experts on the panel during the consultation phase from 7 to 11, specify how many members will be chosen respectively from the Court of Justice, national supreme courts, national public prosecution services and among other highly qualified and experienced lawyers, and include one representative from each of the following bodies: the EESC, the Committee of the Regions, the EU’s Fundamental Rights Agency, the European Court of Auditors and the Council of Bars and Law Societies of Europe (CCBE).

4.2.2 The Committee feels that another appropriate legislative approach would be to establish specific safeguards regarding judges and prosecutors, to ensure their independence, fairness and impartiality, as well as for the purposes of protection and stability. In this regard, the Committee points out that security of tenure for European prosecutors is absolutely necessary, especially where there are complaints against them.

4.2.3 The European Public Prosecutor or his/her deputies may be dismissed by the Court of Justice of the European Union, on application by the European Parliament, the Council, or the Commission. The Court of Justice is to have jurisdiction regarding damage to citizens caused by a European delegated prosecutor, the European Public Prosecutor, or his/her deputies. The Court of Justice is to analyse and resolve damages claims. In disputes relating to compensation, the Committee considers that decisions of the Court of Justice need to be communicated to the European Parliament, the Council and the Commission.

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(12) See Articles 1(b), 4(1) and 12 of COM(2013) 534 final.
(13) COM(2013) 535 final, Article 3: ‘Eurojust’s competence shall cover the forms of crime listed in Annex 1’.
(14) COM(2013) 534 final, Article 8(3).
4.2.4 Legality and hierarchical subordination should be included among the basic principles underpinning the functioning of the European Public Prosecutor’s Office; these are not mentioned explicitly in the regulation. It should be possible for a matter to be brought before the European Public Prosecutor’s Office ex officio. The European system of criminal investigation would gain coherence and consistency if the European Public Prosecutor’s Office could issue guidance and binding instructions to OLAF.

4.2.5 Through decisions on internal operations, effective communication arrangements should be established that ensure the independence of the Office, the European Public Prosecutor, and his/her deputies and staff from any outside influence.

4.2.6 The regulation distinguishes between two categories of offences, the first of which falls automatically within the competence of the European Public Prosecutor’s Office (Article 12) while the second (Article 13) involves offences that have certain links with offences of the first category (related facts). The Committee believes, however, that as long as there is no clear set of definitions of the offences themselves and the offences based on identical facts the remit of the Office should not include offences that are subject to criminal investigations by national prosecutors (closely related to offences affecting the EU’s financial interests). The sole connecting factors mentioned in the regulation are defined by the terms ‘preponderant’ and ‘offences based on identical facts’, which creates unpredictability in the absence of clear definitions of the offences concerned (preponderant from what perspective?) the people involved, the articles of law breached, the financial impact, etc.?).

4.3 Rules of procedure on investigations, prosecutions and trial proceedings

4.3.1 The investigative measures provided for by the regulation, which establishes the types of measures that can be used by the European Public Prosecutor’s Office and the conditions to which they are subject, should be carried out only in relation to criminal offences that fall within the material competence of the European Public Prosecutor’s Office. The various types of decisions that may be made by the European Public Prosecutor’s Office following an investigation, and especially certain specific outcomes, including the decision to prosecute or not to prosecute, should be harmonised at EU level.

4.3.2 The admissibility of evidence collected and presented by the European Public Prosecutor’s Office in trial courts, where such evidence is admitted without any validation, may create situations of inequality and violate the ‘equality of arms’ principle for the defence. Given that the European Public Prosecutor’s Office is supported through institutional cooperation from all structures, bodies, offices and agencies of the EU, and by the Member State authorities, the suspect and the defence will not have similar resources for proving innocence and the ‘equality of arms’ principle will be violated.

4.3.3 Concluding a transaction in the interests of the proper administration of justice may be incompatible with certain national systems and judicial review should not be excluded. The Committee recommends that the Commission define in the regulation what is meant by ‘transaction’ as well as the conditions governing its implementation (including in the case of offences for which the ancillary competence of the European Public Prosecutor’s Office is established).

4.3.4 The procedural safeguards that — in accordance with the relevant standards, in particular the Charter of Fundamental Rights of the European Union — are accorded to suspects and other persons involved in the proceedings of the European Public Prosecutor’s Office, may autonomously establish certain rights (the right to remain silent, the right to legal aid) which have not yet been regulated in EU legislation. These rights should also apply to witnesses, and not just to ‘suspects’.

4.4 Judicial review

4.4.1 When adopting procedural measures, the European Public Prosecutor’s Office is to be considered as a national authority for the purpose of judicial review. In the Committee’s view, judicial review at EU level of the internal measures of the European Public Prosecutor’s Office should also be possible.

4.4.2 The internal rules of procedure (internal operating rules) of the European Public Prosecutor’s Office should govern not only the allocation of cases, but also many other (including substantial) aspects, such as hierarchy, structure and management, specific functions, etc. Although these internal rules are not enforceable but have only an inter-institutional value, for reasons of legal certainty they may be considered as a creator of law and, as such, it should be possible for EU citizens to cite them in criminal proceedings. This option is also in line with Article 86(3) of the Treaty, which prescribes the EU legislator to determine the rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor’s Office in the performance of its functions.

(15) COM(2013) 534 final, Article 13(1) Ancillary competence.
4.5 Protection of personal data

4.5.1 In the specific context of the European Public Prosecutor’s Office, the regulation sets out rules governing the data protection regime, which clarify and complement the EU legislation applicable to processing of personal data by EU bodies (\textsuperscript{16}). The communication of such data to third countries may only take place where there is an agreement in this regard. This data transfer may only take place if it is absolutely necessary for a specific prosecution and the third country assures and complies with the same level of data protection as the EU through an agreement. The supervision of all personal data processing in the context of the activities of the European Public Prosecutor’s Office should be entrusted to both the European Data Protection Supervisor (EDPS) and the relevant national authorities.

4.5.2 The processing of personal data should be limited to people in respect of whom there are serious grounds for suspecting that a criminal offence affecting the EU’s financial interests has been committed. If that is not the case, this could constitute a serious and disproportionate interference in the privacy of those concerned and a violation of the EU Charter of Fundamental Rights.

4.5.3 The Committee considers that an imperative need must exist to warrant the collection of certain data (as set out in Article 37(4)) and that there must be a strong causal and material link with the matters under investigation. The collection of certain additional personal data, as detailed in Article 37(4), should be justified on the basis of being strictly necessary for the investigation and in compliance with the EU Charter of Fundamental Rights, the European Convention on Human Rights, and all the better data protection rules in the Member States.

4.5.4 Where such personal data is not strictly necessary, and in all cases where the person is not prosecuted, the Committee believes that this data should be deleted from the documentation and logs.

Brussels, 11 December 2013

\textit{The President of the European Economic and Social Committee}  
Henri MALOSSE

\textsuperscript{16} In particular Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.