The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

22nd Meeting, 2013 (Session 4)

Tuesday 3 September 2013

The Committee will meet at 10.00 am in Committee Room 2.

1. **European Union legislative proposals:** The Committee will take evidence on—

   a Proposal for a Council Regulation of the European Parliament and of the Council on the establishment of the European Public Prosecutor's Office (EPPO) (12558/13); and

   a Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Co-operation (Eurojust) (12566/13), which may raise questions in relation to subsidiarity;

   from—

   Kenny MacAskill, Cabinet Secretary for Justice;

   Mr Kevin Philpott, Senior Policy Officer, Criminal Procedure Policy Unit;

   Mr David Dickson, International Co-operation Unit, Crown Office and Procurator Fiscal Service.

2. **Tribunals (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   May Dunsmuir, Convener, Additional Support Needs Tribunal for Scotland;

   Heather Baillie, In-house Convener, Mental Health Tribunal for Scotland;

   John Wright QC, Member, Lands Tribunal for Scotland;

   Alastair Beattie, Convener, Scottish Valuation Appeal Committee Forum;

   and then from—

Katie James, Advocard;

Jon Shaw, Welfare Rights Worker, Child Poverty Action Group in Scotland;

Lauren Wood, Policy Officer, Citizens Advice Scotland;

Iain Nisbet, Head of Education Law, Govan Law Centre.

3. **European Union issues** The Committee will consider the latest developments in relation to a number EU issues.

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The papers for this meeting are as follows—

Agenda item 1

Background Note	J/S4/13/22/1
Note by EU Reporter	J/S4/13/22/2
PRIVATE PAPER	J/S4/13/22/3 (P)
Note by EU Reporter	J/S4/13/22/4
PRIVATE PAPER	J/S4/13/22/5 (P)

Agenda item 2

PRIVATE PAPER	J/S4/13/22/6 (P)

Copy of the Bill, accompanying documents and SPICe briefing

Written submissions received on the Bill

Agenda item 3

Note by EU Reporter	J/S4/13/22/7

Justice Committee

22nd Meeting, 2013 (Session 4), Tuesday 3 September 2013

Subsidiarity principle

Background Note

Purpose

1. This paper provides background information on the principle of subsidiarity to assist the Committee in its scrutiny of two EU legislative proposals which have been identified as raising subsidiarity concerns.

Principle of subsidiarity

2. The principle of subsidiarity is that the EU shall only act where (a) it has exclusive competence; or (b) in areas of shared competence, only where the aims could not be achieved at a more appropriate level, whether that be at national, regional or local level. It is based on the presumption that, unless the EU has exclusive competence[1], action should be taken at the lowest level of governance consistent with the subject matter and the objective.

Process

3. The Protocol on the Application of the Principles of Subsidiarity and Proportionality provides for national parliaments to scrutinise EU legislative proposals for compliance with the principle of subsidiarity and, to submit a reasoned opinion where a proposal is found not to comply with the principle. Member States have eight weeks in which to consider whether an EU legislative proposal meets the subsidiarity principle and to submit any reasoned opinion. The EU institution in which the legislative proposal originated must take into account any reasoned opinions submitted by a chamber of a 'national parliament'.

4. There is no direct formal role under the Protocol for the UK devolved administrations. However, they may feed in any views to the UK Parliament. Standing Orders (Rule 10A.3.1) specifies that any EU legislative proposal identified as raising subsidiarity concerns must be considered by the Scottish Parliamentary committee within whose remit the proposal falls. Where that committee considers that the proposal does not comply with the principle of subsidiarity, the Convener is required to lodge a motion for approval by the Parliament, and, if that motion is agreed to, the Presiding Officer notifies the UK Parliament prior to its consideration of the proposal. Where the committee does not share the subsidiarity concerns, no further action is required.

Making the assessment

5. In considering any EU legislative proposals which raise subsidiarity concerns, committees must limit their consideration to subsidiarity alone.

[1] The five areas of exclusive competence are defined in broad terms in Article 3 of the Treaty on the Functioning of the EU as: (1) customs union; (2) the establishing of the competition rules necessary for the functioning of the internal market; (3) monetary policy for Member States whose currency is the euro; (4) the conservation of marine biological resources under the common fisheries policy; and (5) common commercial policy.

6. The Treaty on the European Union implies that two tests should be applied:

(1) **a necessity test**: Is action by the EU needed to achieve the objective? Can the objective of the proposed action only be achieved, or only achieved to a sufficient extent, at EU level?; and

(2) **a greater benefits test**: Would the objective be better achieved at EU level – i.e. would action at EU level provide greater benefits than action by Member States?

7. The Committee may wish to bear in mind the following questions when considering EU legislative proposals which raise subsidiarity concerns:

- Can Member States address the issue acting individually?
- Can Member States, acting individually, fulfil the objectives of the Treaties?
- Would action by the Member States damage the collective interest?
- Would action at EU level produce clear benefits by reason of its scale of effects, compared with action by the Member States? (For example, economies of scale, legal clarity, homogeneity in legal approaches?)
- Does the proposal respect national arrangements and legal systems?
- Does the proposal take account of regional and local factors?
- Does the proposal contain sufficient reasoning for an assessment of subsidiarity to be made?

Justice Committee

22nd Meeting, 2013 (Session 4), Tuesday 3 September 2013

Proposal for a Council Regulation of the European Parliament and of the Council on the establishment of the European Public Prosecutor's Office (EPPO) (12558/13)

Note by the EU Reporter

Purpose

1. The Committee is invited to consider whether the following EU legislative proposal meets the subsidiarity principle:

- Proposal for a Council Regulation of the European Parliament and of the Council on the establishment of the European Public Prosecutor's Office (EPPO)

2. The Convener and EU Reporter agreed to invite the Cabinet Secretary for Justice to attend this meeting to expand on the written information he provided to the Committee in relation to the Scottish Government's position on the compliance of this proposal (and the proposal on reform of Eurojust) with the subsidiarity principle. The Cabinet Secretary has agreed to attend.

Overview of proposal

3. This proposal would create a new independent European Public Prosecutor's Office (EPPO) focused on EU fraud. The EPPO would be able to direct the competent investigative and prosecution authorities within the participating member states through European Delegated Prosecutors appointed within the states. Article 25(1) of the proposal states that "for the purposes of investigations and prosecutions conducted by the EPPO, the territory of the Union's Member States shall be considered a single legal area in which the EPPO may exercise its competence".[1]

4. The Commission has identified that suspected fraud amounted to an average of £425 million in each of the last three years, but it suggests that the actual amount is "likely to be significantly higher".[2] The UK Government's Explanatory Memorandum (attached as Annexe A) on this proposal states that the Commission believes that "Member States are not able satisfactorily to identify, investigate and prosecute EU fraud" and that "a new supra-national EU criminal justice body with investigation and prosecution powers would be best placed to protect the EU's financial interests".[3]

5. The UK Government has confirmed that it does not intend to opt in to this legislative proposal. However, the Westminster committees take the view that the fact that the UK is not going to participate in the EPPO does not prevent them from considering it for compliance with the subsidiarity principle. The Scottish Parliamentary committees are required to consider all legislative proposals which raise subsidiarity concerns, regardless of whether or not the UK Government intends to participate.

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[1] Proposal for a Council Regulation of the European Parliament and of the Council on the establishment of the European Public Prosecutor's Office (EPPO). Available at: http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf

[2] Explanatory Memorandum, paragraph 5.

[3] Explanatory Memorandum, paragraph 7.

6. Further information on the detail of the proposal is provided in the UK Government's Explanatory Memorandum at Annexe A.

Westminster scrutiny

7. Both the House of Lords EU Sub-Committee E (Justice, Institutions and Consumer Protection) and the House of Commons European Scrutiny Committee are to consider this proposal at meetings on Wednesday 11 September and so any decision by the Justice Committee is required at 3 September meeting.

Commission position

8. The Commission believes that the proposal meets the principle of subsidiarity. It argues that "the present situation, in which the prosecution of offences against the Union's financial interests is exclusively in the hands of the authorities of the Member States, is not satisfactory and does not achieve the objective of fighting effectively against offences affecting the Union budget". It therefore states that "steering and co-ordinating investigations and prosecutions of criminal offences affecting its own financial interests … can only be achieved at Union level".

UK Government position

9. The UK Government states in its Explanatory Memorandum (at Annexe A) that it does not believe that the principle of subsidiarity has been met. It argues that:

> "The Commission does not in our view provide robust evidence to justify the creation of a new supra-national agency with extensive and harmonised powers, acting through one new single legal territory across the whole Union and all Member States. We take the view that prevention at source within Member States is as valid as deterrent within the enforcement cycle and a more cost effective one. The Commission does not explore or assess alternative approaches to deliver a strengthened system to prevent EU fraud at source at national level."

Scottish Government position

10. In his letter of 26 August (attached as Annexe B), the Cabinet Secretary for Justice sets out the Scottish Government's view that this proposal **may** breach the principle of subsidiarity. He stated that:

> "There is little or no evidence that consideration has been given to possibilities short of the creation of a new supra-national agency with extensive and harmonised powers. Given the emphasis placed in the Scottish system of the position of the Lord Advocate as the sole source of authority within the prosecution system, this is a matter of concern."

11. The Cabinet Secretary for Justice has agreed to attend the meeting to expand on this position.

Other devolved administrations

12. Neither the National Assembly for Wales nor the Northern Ireland Assembly intends to examine the proposal.

Recommendation

13. The Committee is invited to consider whether this legislative proposal meets the subsidiarity principle and to agree, that:

(a) the proposal ***does*** comply with the principle of subsidiarity. No further action would be required;

OR

(b) the proposal ***does not*** comply with the principle of subsidiarity. In this case, the Convener would then lodge a motion recommending that the Parliament agrees with this position. If the Parliament approves the motion, the Presiding Officer will inform both Houses of Parliament of the resolution.

OR

(c) the proposal ***may*** breach the principle of subsidiarity. The Committee could then write to the relevant Westminster committees highlighting its concerns.

ANNEXE A

EXPLANATORY MEMORANDUM (EM) ON JUSTICE AND HOME AFFAIRS MATTERS

PROPOSAL FOR A COUNCIL REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE (EPPO)
12558/13

COMMUNICATION ON BETTER PROTECTION OF THE UNION'S FINANCIAL INTERESTS: SETTING UP THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE AND REFORMING EUROJUST
12551/13

THE IMPACT ASSESSMENT ACCOMPANYING THE PROPOSAL FOR A COUNCIL REGULATION ON THE ESTABLISHMENT OF THE EPPO 12558/13 ADD1

THE EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT ACCOMPANYING THE PROPOSAL FOR A COUNCIL REGULATION ON THE ESTABLISHMENT OF THE EPPO
12558/13 ADD2

Submitted by the Home Office on 7 August 2013

SUBJECT MATTER

1. This Explanatory Memorandum (EM) concerns a proposal from the European Commission to establish a European Public Prosecutor's Office (EPPO) as part of a wider package of measures intended to combat crimes affecting the financial interests of the European Union (EU). The Coalition Agreement confirms that the Government will not participate in this proposal.

2. Under the proposal, the EPPO would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices in, offences against the Union's financial interests. It would exercise the functions of prosecutor in the competent courts of the participating Member States in relation to offences against the Union's financial interests. This proposal also sets out the general rules applicable to the EPPO, 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. The EPPO proposal has been published alongside a separate legislative proposal to reform the EU Agency Eurojust (under a separate legal base) – 12566/13 – and a Communication on the step-by-step reform of the European Anti-Fraud Office (OLAF) different legislative procedure, the Eurojust proposal is the subject of a separate EM. Her Majesty's Treasury are depositing an EM on the OLAF Communication.

4. The Commission appears to have written this proposal on the premise that all EU Member States will participate notwithstanding the fact that Recital 48 makes clear that Denmark cannot do so, and of course the Government has stated that the UK will not do so. There is only one passing reference to Member States that are not participating in the EPPO, in Article 57(2)(f), which concerns the

relationship between Eurojust and the EPPO. Given that it is clear however that the proposal cannot apply to all 28 Member States, for the purposes of this EM all references to "Member States" in the draft Regulation are taken to mean the *participating* Member States.

The Commission's view on current EU anti-fraud efforts and need for the EPPO

5. The Commission considers that the current financial crisis requires additional measures to tackle fraud against the EU budget. The potential loss is, in the Commission's view, very significant. They have identified an average of about £425 million of suspected fraud in each of the last three years. But they suggest that the actual amount of fraud is "likely to be significantly higher" citing undetected "dark figures" of fraud of around £2.55 billion a year.

6. Article 86 of the Treaty on the Functioning of the European Union (TFEU) says that the Commission "may" propose the creation of an EPPO. The Commission's argument for doing so is to correct what they see as the deficiencies of the current enforcement system, which is based on investigations and prosecutions led at the national level, supported by the work, at the cross border level, of relevant EU Agencies – OLAF, Eurojust and Europol.

7. While existing EU measures and Article 325 of the Treaty provide Member States with wide legal obligations for tackling fraud against the EU budget, the Commission considers that a new supra-national EU criminal justice body with investigative and prosecution powers would be best placed to protect the EU's financial interests. The Commission believes that Member States are not able satisfactorily to identify, investigate and prosecute EU fraud. The Commission suggests that EU fraud is not a priority at national level and that the outcomes of criminal justice cases (e.g. conviction rates) are uneven across Member States and that this in itself is a problem requiring rectification at the EU level.

Structure, operating model and appointments

8. The EPPO would be a new independent EU investigative and prosecutorial Agency focussed on EU fraud. The model for the proposed EPPO is described as 'decentralised'. This would mean that a small central team of the EPPO would be created (comprising the European Public Prosecutor (EPP) and four deputies), that would then work through a system of European Delegated Prosecutors (EDPs) in each participating Member State. The central EPPO team would be able to direct the competent investigative and prosecution authorities within the participating Member States through the EDP network for the offences within its competence (see below).

9. Crucial to the idea behind the operation of this system is the proposal that EDPs would have so called "double hat". In other words the EDPs would be able to act under the auspices of both the EPPO for offences within the EPPO's competence and have national level competence under their national roles, thus, in the Commission's view, integrating the EPPO into national criminal justice systems of the participating Member States. However, the Regulation makes clear that when the EDP acts within the EPPO mandate, they shall be fully independent from the national prosecution bodies and have no obligations with regard to them. So the EDPs can switch between their two roles as EDPs and as national prosecutors but they cannot be both at the same time. The Regulation states that where there are conflicting assignments, the EDPs should give priority to their EPPO functions.

10. The EPP and the four deputies will be appointed by the Council with the consent of the European Parliament for a term of eight years, which will not be renewable. The Council shall act by simple majority. They will be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to high judicial office and relevant prosecutorial experience, based on an open call for candidates and a shortlist drawn up by the Commission after seeking the opinion of a panel set up by it. This panel will be composed of seven persons chosen from among former members of the Court of Justice, members of national supreme courts, national public prosecution services and/or lawyers of recognised competence, one of whom shall be proposed by the European Parliament, as well as the President of Eurojust as an observer. The Deputies of the European Public Prosecutor shall be appointed in the same way and subject to the same criteria, except that the Commission will draw up the shortlist to reflect the demographic balance and geographical range of the Member States. The Court of Justice of the European Union may, on application by the European Parliament, the Council, or the Commission, dismiss the EPP or the Deputies.

11. The appointment of the EDPs follows a different system. Each Member State will present the EPP with a list of at least three candidates. At least one, demonstrating the qualifications required for appointment to high judicial office and with relevant prosecutorial experience and who's independence is beyond doubt, will be selected. Member States will then appoint the selected EDP as a prosecutor under national law, if at the time of his/her appointment as an EDP, he/she did not have this status already. They shall be appointed for a term of five years, which shall be renewable. EDPs may be dismissed by the European Public Prosecutor but shall not be dismissed as national prosecutors by the competent national authorities without the consent of the EPPO. The Commission views the EDPs as the best way to deliver the "assimilation principle" i.e. that acts of the EPPO are considered to be national acts of investigation which respect national laws.

<u>Legal status, jurisdiction and competence</u>

12. The Regulation says that "for the purposes of investigations and prosecutions conducted by the European Public Prosecutor, the territory of the Union's Member States shall be considered a single legal area in which the European Public Prosecutor's Office may exercise its competence" (Article 25(1)).

13. The Commission proposes that the EPPO would have exclusive competence to investigate and prosecute "criminal offences affecting the financial interests of the Union". These offences (herein called "PIF offences") will be defined by reference to the yet to be agreed proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law – 12683/12 (herein called the "PIF Directive"). National authorities in participating Member States, EDPs and all institutions, bodies, office and agencies would be obliged to report all suspicions regarding PIF offences to the EPPO (as it would have exclusive competence). Additionally, the proposal says the EPPO may collect or receive information from any person on conduct which might constitute a PIF offence.

14. Furthermore, in its Communications on the EPPO and OLAF, the Commission explains that additional criteria would be provided in relation to so called "ancillary offences" (i.e. offences inextricably linked to a PIF offence e.g. bribery and corruption) to determine jurisdiction. Therefore where a PIF offence is inextricably linked with others and joint investigation and prosecution are in the interests of a good administration of justice, the proposal says the EPPO would

also be competent for the related offences as well as the PIF offence, but only if the PIF offences are 'preponderant' and the other offences are based on identical facts. If not, the EPP may decide that a participating Member State will be deemed competent.

Investigative powers

15. In respect of participating Member States, the Regulation grants the EPPO the use of a wide range of investigative powers and measures. The Regulation states that Member States shall ensure that an extensive list of investigative measures are available for use by the EPPO, such as search and seizure powers, obtaining data, sealing premises, freezing property and evidence, interception, surveillance, monitoring financial transactions and summonsing witnesses. This would presumably require domestic law amendments in some participating Member States where the EPPO is excluded from accessing such pre-existing powers and/or where the power is currently non-existent. The Regulation goes on to state that such measures will be subject to conditions provided for by the EPPO Regulation itself (for example, that there must be reasonable grounds to use an investigative measures and that judicial authorisation must be given in certain circumstances) *and* national law. This provision therefore ensures that the EPPO's investigative powers are only exercised in participating Member States within the same legal frameworks that are currently available for domestic law enforcers and prosecutors.

16. The EPPO would be able to obtain any relevant information from national criminal investigation or law enforcement databases and registers of public authorities in participating Member States. The EPPO would be allowed to access this information through the EDPs too. National authorities would be required to take any actions necessary and comply with the instruction of the EPP, its deputies and EDPs, and execute the investigative measures assigned to them by the EDP.

Prosecutorial and Procedural rules

17. The Commission proposes that the EPPO would have the same powers as national public prosecutors in national courts in participating Member States, operating under the legal system of Civil Law countries. This would include evidence gathering, deciding whether to charge the individual and taking the plea. The EPPO would also choose which participating Member States' national court would take the case, based on a number of factors outlined in the Regulation, such as where the crime was committed and the habitual residence of suspects, witnesses and victims. The EPPO would also be given dismissal decision powers, including the right to dismiss through transaction i.e. the EPPO may decide to dismiss the case if the suspected person pays a lump-sum fine and compensation to the Union through the EPPO (not the Member State). If the national court's final ruling is confiscation, the monetary value of those confiscated assets will also go to the Union's budget. Where necessary to remove blockages to its investigations, the EPPO would have the power to request the lifting of immunity, whether at national or at Union-level, in accordance with the applicable rules.

Procedural safeguards

18. The proposal says that investigations in participating Member States would have to respect the Charter of Fundamental Rights of the European Union including the right to a fair trial and the rights of defence. The proposal provides that any suspect and accused person involved in the proceedings of the EPPO's office should have, as a minimum, certain rights, in accordance with national law. The

proposal refers to EU Directives on: the right to implementation and translation; the right to information and access to case materials; and access to a lawyer. The proposal also defines other rights which have not been regulated by the EU; the right to remain silent; the right to be presumed innocent; the right to legal aid, the right to present evidence.

Judicial review

19. The EPPO would be considered a national authority for the purposes of judicial review within the participating Member States. The EPPO's decisions would be subject to judicial review in national courts and not the European Court of Justice (ECJ). The Commission says that this will ensure the application of the "assimilation principle". There will only be recourse to the ECJ on questions of interpretation from national courts, dismissal of the EPP and EDP and jurisdiction on disputes over compensation for damages. No judicial review would be possible on any EPPO decision to dismiss a case through transaction.

Processing of information and Data protection

20. The proposal includes rules for the processing of information by the EPPO, such as the collection of information from a range of sources, and the creation of a Case Management System (drawing on Eurojust's IT infrastructure). This would contain personal and non-personal data.

21. The EPPO would appoint a Data Protection Officer (DPO) to ensure that a written record of the transfer of personal data is kept, to cooperate with EPPO staff responsible for procedures, training and advice on data processing and to prepare annual reports. The European Data Protection Supervisor would also work in close cooperation with the national data protection authorities. There would be recourse for a data subject to access and rectify personal data and a right to lodge a complaint with the European Data Protection Supervisor. The EPPO would be liable for any unauthorised or incorrect processing.

22. The general position as set out in Article 56(2) is that the EPPO will be able to directly exchange all information, *except personal data*, with Union bodies or agencies, the competent authorities of third countries, international organisations or Interpol in the performance of its tasks. However, Articles 57(2)(a), 58(2), 60 and 61 state, to the contrary, that the EPPO will be able to transfer or exchange personal data with Eurojust, Europol, Union bodies or agencies and, if certain conditions are met, third countries, international organisation or Interpol. The EPPO may also receive and process personal data from these entities in the performance of its tasks. The EPPO proposal is intended to fit into existing data protection proposals as paragraph 3.3.6 of the EM at the front of the proposal makes clear that Regulation 45/2001 on data protection by EU institutions will apply to the EPPO.

Co-operation with Eurojust, OLAF, Europol and other EU institutions, agencies and bodies

23. Article 86(1) TFEU describes the EPPO being established "from" Eurojust. The Commission has interpreted this article by creating what it describes as "operational, administrative and management links" between them. The Commission's proposals include the following:

a) The ability of the EPPO to request Eurojust or its competent national members to participate in the coordination of, or to use powers attributed to them by Union legislation or national law for, specific acts of investigation that that may fall outside the EPPO's scope of competence and/or to support the transmission of EPPO decisions or requests for Mutual Legal Assistance;

b) A role for Eurojust in "facilitating agreement" between the EPPO and participating Member States over competence on ancillary offences – i.e. those connected with PIF offences;
c) Use by the EPPO of elements of Eurojust infrastructure, such as its technical support in preparing EPPO budgets, human resources and IT system;
d) Exchanging information, including personal data between the two bodies; and
e) Automatic cross-checking of data held by Eurojust and the EPPO on a shared Eurojust Information Technology (IT) platform knows as the Case Management System.

24. The EPPO would also develop a special relationship with Europol, with a focus on the exchange of information including personal data, cooperate with the Commission and OLAF on the wider fight against fraud, and enter into cooperative relations with other Union institutions, bodies, offices and agencies.

Third country co-operation

25. The Regulation proposes that participating Member States would be required to recognise the EPPO as a competent authority for the purpose of implementing international agreements on legal assistance in criminal matters and extradition, o where necessary alter those international agreements to ensure the EPPO can rely on such agreements if the EPPO is currently excluded. The EPPO may also establish agreements in its own right with competent authorities of third countries and international organisations.

SCRUTINY HISTORY

26. None. This is a new proposal.

MINISTERIAL RESPONSIBILITY

27. The Home Secretary has responsibility for policy on policing and the fight against crime (except in Scotland and Northern Ireland), including mutual legal assistance and extradition. The Justice Secretary and the Attorney General have interests in criminal justice matters and the Chancellor of the Exchequer has an interest in respect of the budget of the European Union and policy responsibility for OLAF.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

28. Scotland and Northern Ireland have an interest and the Devolved Administrations have been consulted. Scotland has noted the Government's position and has made no further comment at this time. Northern Ireland confirms that their prosecutorial and investigative functions are separate and that prosecutors in Northern Ireland do not have powers in relation to search, seizure, interception, surveillance, monitoring financial transactions or covert video surveillance.

LEGAL AND PROCEDURAL ISSUES

Legal base

29. Article 86 of the Treaty on the Functioning of the European Union is the relevant legal base here and provides that the EPPO's remit is confined to that of crimes affecting the financial interests of the Union. It is therefore questionable whether it is within the Commission's competence to propose that the EPPO can request Eurojust or its national members to use its powers to investigate acts that fall *outside* the EPPO's scope of competence (Article 57(2) of the EPPO draft Regulation).

30. We will also want to explore further the EU's competence under Article 86 of the Treaty to regulate the criminal procedural rights of individuals. Article 82(2) of the

Treaty is the basis on which the EU may establish minimum rules, by means of Directives in accordance with the ordinary legislative procedure, on the rights of individuals in criminal procedure. We will want to consider how the provisions relating to criminal procedural rights which the EU has not legislated on, would impact on any future criminal procedural rights measures which the Commission might bring forward under Article 82(2).

31. This proposal triggers the JHA opt-in (Protocol 21 to the Treaties) and the UK has three months from the date of publication of the final language version of the proposal to decide whether to participate. In practice, however, the Government has confirmed in the Coalition Agreement that it will not opt in.

European Parliament procedure

32. The proposal for this Regulation will be subject to the special legislative procedure i.e. the Council may unanimously establish the EPPO after obtaining the consent of the European Parliament.

Voting procedure in the Council

33. Unanimity. In the absence of unanimity, the legal base provides a procedure for a minimum of nine Member States to move to enhanced co-operation.

Impact on United Kingdom law

34. The Government will not participate in this proposal. The EU Act 2011 also requires that should a future Government seek to participate then an Act of Parliament would need to be passed and a referendum held. If any future Government proposed participation and implementation of the EPPO, and passed the abovementioned tests, this would also require profound changes to UK law.

Application to Gibraltar

35. Gibraltar understands that the UK is not seeking to join the proposed Council Regulation setting up the European Public Prosecutor's Office. The Regulation as worded usurps the role, functions and authority of the Attorney General and his Chambers (Gibraltar's public prosecutor service) and the Royal Gibraltar Police (Gibraltar's Police Authority). Furthermore the measure conflicts with the written Constitution of Gibraltar.

Fundamental Rights Analysis

36. It is the Government's view that this Regulation engages Article 7 (respect for private and family life), Article 8 (protection of personal data), Article 17 (right to property), Article 41 (right to good administration), Article 42 (right to access to documents), Article 47 (right to an effective remedy and to a fair trial), Article 48 (presumption of innocence and right of defence) and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter of Fundamental Rights. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality.

37. With regards to data protection, there is a risk that the EPPO provisions, as currently drafted, interfere with Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter. There are numerous legal obligations set out in the draft Regulation that will lead to a more liberal regime of exchanging data and the following is a list of some of the legal obligations set out

in the Regulation that could collectively amount to a failure to respect the essence of Article 7 and 8 of the Charter:

- Article 15(1) and (2) state that all national authorities of Member States, all institutions, bodies, offices and agencies of the Union and all EDPs are obliged to immediately inform the EPPO where they become aware of conduct that might constitute an offence within the EPPO competence.
- Article 15(3) provides that the EPPO may collect or receive information from any person on conduct which might constitute an offence within its competence.
- Article 20 states that the EPPO shall be able to obtain any relevant information stored in national criminal investigation and law enforcement databases or registers of public authorities. The EPPO would be allowed to access this information through the EDPs too.
- Article 21 provides that the EPPO shall obtain any relevant information from Eurojust and Europol and that the institutions, bodies, offices and agencies of the Union and Member State authorities shall provide the necessary assistance and information to the EPPO upon its request.
- Articles 57(2)(a), 58(2), 60 and 61 state that the EPPO will be able to transfer or exchange personal data to Eurojust, Europol, Union bodies or agencies and, if certain conditions are met, third countries, international organisation and Interpol. The EPPO may also receive and process personal data from these entities in the performance of its tasks.

38. However, Recital 17 and Article 11(1) of the Regulation state that the activities of the EPPO should in all instances be carried out in full respect of Charter rights so there is a limitation on the EPPO's power here in that any exchange of data must be complaint with Charter rights. The EPPO proposal is also, as mentioned above, intended to fit into existing (and future) data protection laws. Furthermore, the purpose of the EPPO's data exchange and processing powers appear to be related entirely to the EPPO's general functions. It is therefore likely that the data protection provisions respect the essence he particular rights in question and that the interference complies with the requirements of necessity and proportionality.

39. With regards to the rights of the suspects etc, there is a risk that providing the EPPO with such an extensive list of investigative powers, as currently drafted, will interfere with private and personal property rights under Article 7 and 17 of the Charter and the right to a fair trial, the rights of the defence, the presumption of innocence and the principle of *ne bis in idem* as enshrined in Articles 47, 48 and 50 of the Charter rights of affected individuals. It is questionable whether it is necessary and proportionate to grant the EPPO access to sensitive and draconian investigative powers, such as interception and surveillance, if the EPPO can just order law enforcement agencies to undertake investigative measures by simply relying on their own existing domestic powers (see Article 18(1) of the EPPO proposal).

40. However, the Regulation does make clear that such investigatory measures will be subject to conditions set out in the Regulation *and* in national law so this ensures that the EPPO's investigative powers are only exercised in participating Member States within the same legal frameworks that are currently available for domestic law enforcers and prosecutors. Recital 33 also makes clear that the EPPO Regulation is required to respect, in particular, the right to a fair trial, the rights of the defence, the presumption of innocence and the right not to be tried or punished twice in criminal proceedings for the same offence, as enshrined in Articles 47, 48 and 50 of the Charter. Chapter IV of the Regulation sets out an extensive set of minimum rights and states that the EPPO is obliged to comply

with the rights of the suspect person enshrined in the Charter, including the right to a fair trial and the rights of the defence, so the EPPO is restrained in his decision-making to the extent that he must act in compliance with these Charter rights (although we query whether the Commission has such competence given issues surrounding the legal base). Thus, although such investigatory powers may not be necessary or proportionate, it is likely that they will at least respect the essence of the particular rights in question.

41. With regards to rights of the suspects etc again, there is a risk that providing the EPPO with the power to open an investigation and prosecute in a location of his choice that could interfere with Articles 7, 17, 47, 48 and 50 of the Charter in that the EPPO could choose to prosecute in a Member State that had a lower standard of criminal proceedings than another Member State. However, all other mutual recognition instruments are based on the concept of mutual trust of the criminal justice systems in other Member States so it should theoretically not be problematic that the EPPO has the power to open an investigation and prosecute in a location of his choice. The EPPO is obliged to consider a number of factors before making a choice about jurisdiction and any such decision must be made taking into account the proper administration of justice. It may be worth noting that the EPPO proposal may in fact increase protections enshrined in Article 50 (the right not to be tried or punished twice in criminal proceedings for the same offence) as the advantage of having an EPPO is that there is less risk that an individual involved in cross-border fraud, for example, will be subject to numerous prosecutions in various countries.

42. With regards to effective remedies and good administration, there is a risk that this proposal may interfere with Article 41 (right to good administration) and Article 47 (right to an effective remedy and to a fair trial) of the Charter. It is questionable whether the Regulation respects the right to an effective remedy because there is currently a lack of detail on how the judicial review procedures would operate in practice. The impact assessment states on page 50 that the judicial review procedures would have to involve both national courts and the ECJ but the draft Regulation itself doesn't provide for ECJ involvement. These provisions will require further clarification.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

43. Not applicable.

SUBSIDIARITY

44. The Commission asserts that the principle of subsidiarity has been met. It sees the need for the Union to act because the foreseen action has an intrinsic Union dimension. It implies Union-level steering and coordination of investigations and prosecutions of criminal offences affecting its own financial interests, the protection of which is required both from the Union and the Member States by Articles 310(6) and 325 TFEU. In the Commission's view, this objective can only be achieved at Union level by reason of its scale and effects.

45. However, the Government does not agree. We do not believe that the principle of subsidiarity has been met. The Commission has jumped from the options of taking no action or taking no new regulatory actions to variations on the creation of an EPPO. The Commission does not in our view provide robust evidence to justify the creation of a new supra-national agency with extensive and harmonised powers, acting through one new single legal territory across the whole Union and all Member States.

46. The Commission has based this proposal on the premise that Member States do not have the will or the capacity to act to protect the Union's budget, and that a 100% prosecution rate is the most effective deterrent where the EPPO's decision to prosecute takes priority over national cases. We take the view that prevention at source within Member States is as valid a deterrent within the enforcement cycle and a more cost effective one. The Commission does not explore or assess alternative approaches to deliver a strengthened system to prevent EU fraud at source at national level. These might include further simplification of rules that govern the different sectors of the EU budget to make it easier to apply and difficult to defraud for Member States to take full responsibility for funds that they administer, or effective enforcement by the Commission to force Member States to improve their management and control systems.

47. The Impact Assessment has consistently included OLAF figures, which include data and information from Denmark and the UK. In our view, the Commission's assessment, calculations of risk and therefore its projection of the scale of the problem do not appear to take account of the fact that at least Denmark and the UK will not participate.

48. The Commission also includes VAT fraud and customs duties (including subsidised tobacco and cigarette smuggling) in its list of Union finances and as a component of EU fraud. It identifies these as the main risk for offences which fall within the EPPO's remit based on PIF offences and also as the significant proportion of total EU fraud. The Commission's assessments and examples therefore include these revenue incomes and actual and projected figures for such offences. However, Member States, including the UK, have consistently asserted during the negotiation of the PIF Directive that VAT fraud (and potentially customs duties) is within national competence and are not EU fraud. If excluded as PIF offences, noting that the negotiation on the PIF Directive has yet to be concluded to confirm this exclusion, then the Commission's justification for an EPPO response is fundamentally flawed.

POLICY IMPLICATIONS

49. We do not support this proposal. Whilst the Government considers the protection of the EU's financial interests to be important, we do not believe that the creation of a supra-national prosecutor in the form of an EPPO is either necessary or proportionate. The Coalition Agreement confirms the UK will not participate. Under the terms of the Treaties, neither will Denmark. Ireland, too, has an opt-in decision to make. It is, therefore, surprising that the Commission has written this proposal and assessed its benefits on an apparent basis that all Member States will be participating. It includes no information on how the EPPO will interact with non-participating Member States, other than a reference to relations with Eurojust in Article 57(2)(f), which is a critical issue for the UK. We will seek to clarify in negotiations in order to protect our position in line with our rights under Protocol 21 where we do not opt in to a JHA measure.

The Commission's approach

50. The Government does not agree with the Commission's assessments and believes that the creation of an EPPO is not the appropriate response to tackling EU fraud. For those Member States which participate, this proposal would take responsibility for tackling fraud against the EU budget away from national-level decision making. It would be placed under the direction of a supra-national authority, which would in turn have the authority to instruct the EDPs to prioritise EU fraud above other crime at a national level. We do not believe that is the right

approach. It must be for Member States to determine their national priorities, and consequent use of resources, in tackling crime.

51. The EPPO would fundamentally disrupt the current system for tackling fraud against the EU budget. In both the 2010 and 2011 Annual Reports on *Protection of the European Union's financial interests – Fight against fraud,* the Commission reported two consecutive years of decrease in fraudulent and other irregularities affecting the EU budget and a decrease in the estimated financial impact of irregularities.

52. We already take fraud against the EU budget within the UK extremely seriously and believe that the best way to tackle EU fraud is through prevention. The UK has a zero tolerance approach to all fraud, with robust management controls and payment systems in place that seek to prevent incidences of EU fraud. For EU funding programmes, all agencies which have responsibility in the UK for distributing EU funds have processes in place to monitor and report fraud in line with current regulations. The high standard of checks, which are carried out robustly, mean that levels of such fraud are low in the UK.

53. In the Government's view, the EPPO would duplicate powers and bodies existing within Member States to protect the Member States' and EU's financial interests, especially from organised crime, and take competence for PIF offences away from participating Member States, therefore drawing emphasis away from making each Member State responsible for anti-fraud work at national level. It will move attention from prevention to reaction after the crimes have already been committed, and we fear that it will slow down progress while creating limited added value.

54. Even where the crime is a major EU fraud spanning several Member States, the existing EU bodies, such as OLAF, should gather and supply evidence to Member States' national authorities within existing and strengthened mechanisms to bring such cases to prosecution and conviction. We also believe that there should be urgent improvement in the Commission's oversight of EU implementation and data gathering procedures, active engagement with Member States alongside OLAF to prevent fraud, as well as greater will from the Commission to simplify EU funding systems and regulations which will make fraud harder to commit in the first place.

55. The Government sees OLAF's work to detect and tackle fraud and seek financial redress for the EU budget when it is found as key to a strong prevention environment. OLAF's 2012 report notes an increase in Member States' engagement with OLAF and we see room to build on successes and improvements in OLAF's own efficiency rather than wholesale disruptive reform. Additionally, it appears that the Commission have only considered a criminal justice system response to its analysis of the problem and not considered improving existing mechanisms within the system.

56. Given this, the Government strongly believes that the EU's current focus should be on effective implementation of the existing mechanisms to bring procedures to combat such crimes fully into use; not on the creation of an additional EU body. From both a UK and an EU-wide perspective, the Government believes that the creation of an EPPO is unnecessary and flawed.

57. The Government notes that the Commission has not sought to apply the EPPO's competence to other serious cross border crimes under the terms of Article 86(4), although Article 74 of the proposal allows the Commission to report on the

feasibility and advisability of extending the competence of the EPPO to other criminal offences and to submit legislative proposals on this matter. However, any proposal to extend the competence of the EPPO to other criminal offences would require a unanimous decision taken by the European Council. Again, that is not something the Government would support.

Application of the JHA Opt-in

58. In accordance with the Protocol on the position of the UK and Ireland in respect of the area of Freedom Security and Justice, annexed to the Treaties, this Regulation would only apply to the UK if we chose to opt in to it. The Government's decision not to opt in is clearly stated in the Coalition Agreement. The UK's Opt-in Protocol makes clear no measure adopted in the field of freedom, security and justice shall affect the "competences, rights and obligations" of the UK where we chose not to opt in. The Government have offered a debate under the Lidington arrangements on the parallel opt-in decision triggered by the new Eurojust proposal. Although we have already confirmed our position on the EPPO, we would expect the debate to include reference to the EPPO proposal.

Non-participating Member States

59. As already noted, the Commission's proposal appears to be written on the premise that all EU Member States are participating. It is silent on the EPPO's interaction with non-participating Member States, other than one reference. Article 57(2)(f) would allow the EPPO to "request" that Eurojust provides support in the transmission of the EPPO's decisions or MLA requests from the EPPO to Member States that participate in Eurojust but do not participate in the EPPO. It is clear, however, that at least the UK and Denmark will not participate. During negotiation this issue of the interaction with non-participating Member States will need very careful examination. The UK's interests will include the following:

a) To ensure respect under Treaties for non-participating Member States' legal systems, including the protections in Protocol 21 where the UK has not opted in.
b) How the Commission views the EPPO interacting with non-participating Member States.
c) How authorities in non-participating Member States will interact with authorities from participating Member States where the EDPs are acting under the auspices of the EPPO. We will want clarification on, and a clear distinction between, the EPPO role and the national role.
d) The implications for existing and future cross-border investigations which include the UK, especially where they involve interception capabilities.
e) The full implications of the creation an EPPO on other EU Agencies, such as OLAF, Eurojust and Europol, including the effect of Article 57(2) in respect of Member States participating in Eurojust, but not in the EPPO as mentioned above.
f) What the legal and operational implications are of the Commission's proposal for the EPPO to have "ancillary competence" for offences beyond "PIF offences" (Article 13 of the Regulation).
g) Examining carefully the implications for the UK and international relations of the Commission proposals around the EPPO having third country Agreements and making use of the existing bilateral agreements of participating Member States.
h) Determining the scope of jurisdiction in respect of citizens and businesses of non-participating Member States based in the territory of a participating Member State.
i) Understanding the full implications for data exchange and data protection of the EPPO proposal, such as the exchange of data between the EPPO and other EU

Agencies and third countries and the relationship with the draft data protection proposals currently under negotiation.

j) Even as a non-participant, we will want to examine carefully the operation of the EPPO, as the EPPO could ultimately determine the location of a prosecution (based on criteria), which may raise concerns about so called forum shopping i.e. selecting a court system that is likely to be most favourable to a conviction.

Impacts on participating Member States and future EU law

60. We note the Commission's use of the term "single legal territory" in relation to the EPPO's powers to operate with sole competence for "PIF offences". "Single legal territory" is a new term which raises serious concerns for the future direction of criminal law at EU level. We want to understand, and challenge where necessary, exactly what the Commission means by this term.

61. We are concerned that the EU does not have competence to bring forward criminal procedural rights regulations under Article 86. Article 82(2) provides such a legal base and is restricted to bringing forward Directives; it is also subject to the ordinary legislative procedure. We plan to raise this during negotiations. Even if this issue did not arise, we would also be concerned that the provisions on criminal procedural rights that the EU has not yet legislated on under Article 82(2), such as legal aid, would set unhelpful precedents for any future legislative instruments under Article 82(2) which would apply to all suspects and accused persons.

62. We will also want to clarify whether the proposed EPPO model does indeed deliver the assimilation principle to respect national laws, especially where there is a lack of national court oversight of EPPO investigative powers. Our understanding is that currently all of the listed investigative powers sit within national courts and that there will need to be a fundamental change across all participating Member States' national legal systems.

63. Additionally, we are disappointed to see that the European Ombudsman is the only recourse for a participating Member State to challenge an EPPO decision to drop a case because the suspect has paid monies to the EPPO and Union, regardless of national and public interest to take forward a conviction.

64. The proposal for the Regulation to give priority to PIF offence cases led by the EPPO above domestic cases means that there is no longer the right for States to choose how best to use their own resources to tackle serious crime. At time of constrained resources this is concerning and we believe it is for domestic prosecution agencies to decide on priorities.

65. We will want to clarify if the amendment of Third Country agreements proposed by the Commission is a compulsory unilateral amendment of all existing and relevant criminal justice bilateral agreements. In our view, this approach will set a worrying precedent which could undermine individual Member States' diplomatic relationships with Third Countries.

Relationship with Eurojust

66. The decision on whether or not the UK participates in the parallel new Eurojust Regulation will be the subject of a separate opt-in decision. In negotiation the Government will want clearly to determine the implications of the Commission's proposals for the interaction of the two bodies. The Commission has proposed giving the EPPO exclusive competence for PIF offences and removing competence for these offences from Eurojust, but there will need to be clarity

about where competence falls for any Member State that does not participate in the EPPO, but does participate in Eurojust. The Government will also want to question whether it is within the Commission's competence to propose that the EPPO can request Eurojust or its national members to use its powers to investigate acts that fall *outside* the EPPO's scope of competence, (Article 57(2)). Furthermore, the Government will need to explore the logistics and the cost of the EPPO's operational relationship with Eurojust given that expenditure resulting from implementation of any enhanced cooperation, should this arise, should be borne by participating States (Article 332 TFEU).

Relationship with OLAF

67. Although reform of the legislative framework for OLAF has only recently been completed, the implications of the Commission's proposal for an EPPO would have a significant impact on OLAF. In particular, OLAF's responsibilities would be scaled back significantly and the Commission envisages a transfer of staff from OLAF to the EPPO. Again, as the UK will not participate in the EPPO we will want absolute clarity on the effect of this proposal in terms of operations and resources.

Relationship with Europol

68. The Regulation proposes that the EPPO would be able to request any relevant information from Europol, including personal data and analytical support to a specific EPPO investigation. Europol would be obliged to provide the necessary assistance and information as a result of that request. We would want to resist this provision generally, as allowing the EPPO access to Europol information may risk the integrity of Europol's operations and could deter Member States' law enforcement bodies from sharing data openly.

Accountability of the EPPO

69. The EPPO would be held accountable to the European Parliament, the Council and the European Commission for its general activities. It will produce annual reports which would be sent to the above EU institutions and also to the national Parliaments, and the EPP would appear once a year before the European Parliament to give an account of the EPPO's activities. Even though the UK will not participate in the EPPO, we will want to ensure in negotiation that its accountability mechanisms are robust. The EPP could also be invited to appear before national Parliaments to participate in an exchange of views in relation to the general activities. In addition, the EPPO will produce annual and multi-annual programmes, an anti-fraud strategy, conflicts of interest rules, staffing rules, and rules governing handling of compensation and fines monies. The EPPO will be subject to audit by the European Court of Auditors and the European Court of Justice will have jurisdiction over compensation for damages in cases of non-contractual liability.

IMPACT ASSESSMENT

70. The Impact Assessment (IA) is poorly evidenced in that the data it uses simply stems from cases referred to OLAF and does not take into account other work at the national level, including the degree of prevention at source. Much of the data is incomplete and much of the work is assumption driven. The benefits are simply assumed to be greater for options 4c (decentralised, £2,270 million) and 4d (centralised £2,465 million) and unsurprisingly they come out as the most effective solutions. Indeed the Cost Benefit Analysis in Annex 4 states that '*key parts of the analysis are based on assumptions'*. The presentation of data in the IA also includes data and information from the UK and Denmark which is misleading since neither country will participate in the EPPO.

71. The IA rationale for the EPPO is therefore very weak. It also assumes that the creation of the EPPO is the only effective way to resolve the problem. It does not consider enhanced incentives or other options for reform in any detail or in a rigorous manner. The most glaring omission is the meaningful reform of the current national based system.

72. The Commission is incorrect to judge Member States' current performance and the effectiveness of the options against a target of securing convictions in 100% of cases. The application of the principle of legality be necessary to guarantee this (whereby some Member States are obliged to prosecute certain conduct rather than exercising discretion in the public interest), and the right to a fair trial means that it is for the courts at national level and not the EPPO to decide such matters based on the evidence provided to those courts.

73. The IA cites differences in approach, language and culture in Member States. However, it ignores the fact that even if investigation and prosecution were directed at the supra-national level, these issues would still exist. In turn these will hamper effective decision-making. The central approach (option 4d) would also totally ignore case law/common law approaches in national law.

74. The IA fails to take into account: the complexity, size and length of cases, the proportionality of effort, existing international co-operation, the risk of delay, differing legal frameworks, the experience of the prosecuting authority, sentence (as a deterrent effect), the probability of being caught, resources and preventative measures.

75. There is a clear problem with the costing as the creation of the EPPO will cause much disruption and the IA states that the creation of the EPPO will come out of existing resources. It is very difficult to believe that this will be a cost neutral change. Many of the costs in Annex 4 are left out as is it is not possible to calculate them. Annex 4 is also not as transparent as it should be. The calculations of the majority of estimates are not provided.

76. The IA confirms convictions and confiscation returns. Due to different systems within Member States, the Commission cannot assume that every conviction will mean a confiscation and recovery of funds to the centre.

FINANCIAL IMPLICATIONS

77. The Commission states that the central EPPO will not generate substantial new costs and that "the overall costs of law enforcement will be more balanced as a result of efficiency gains". Our assessment of the Impact Assessment and the cost benefit analysis does not reassure the Government that this is correct or has been accurately assessed. Additionally, the inability to include figures for OLAF in the Estimated Financial Impact sections is worrying.

78. We expect the EPP and Deputy EPP posts to be drawn from the central EU budget (unless the enhanced co-operation procedure is activated), but we will also expect a recharge for non-participating Member States for these costs. The Regulation also proposes that whenever the national prosecutor is acting as an EDP, the relevant expenditure shall be regarded as a Union budget cost. It is not clear how this "double-hat" funding will be administered. We do not support the relevant EPPO portion of their work being reimbursed from the central EU budget. The EPPO will also rely on the available resources in the participating Member States already dealing with "PIF offences", which also involve organised

crime offences outside of the remit of the EPPO. This will further draw on national budgets of the participating Member States. The Government would also expect there to be a recharge to non-participating Member States for costs incurred by other Agencies, such as Eurojust, OLAF and Europol, in providing services to the EPPO.

CONSULTATION

79. The Crown Prosecution Service, the Serious Fraud Office, the Attorney General's Office, Serious Organised Crime Agency/National Crime Agency, the College of Policing, Ministry of Justice, Her Majesty's Treasury, Her Majesty's Revenue & Customs, the Metropolitan Police, the Scottish Government, the Crown Office and Procurator Fiscal Service, and the Public Prosecution Service for Northern Ireland have been consulted in the drafting of this EM.

TIMETABLE

80. We expect that this proposal will be presented at the October Justice and Home Affairs Council, with negotiations continuing into 2014. Only if and when Member States make clear that there is no unanimity of those participating would the Commission look to move to enhanced co-operation.

Mark Harper
Minister of State for Immigration
Home Office

ANNEXE B

Correspondence from the Cabinet Secretary for Justice in relation to the subsidiarity concerns regarding EU legislative proposals on establishment of a European Public Prosecutor's Office and reform of Eurojust

I understand your Committee is seeking the views of the Scottish Government on the following proposed European instruments:-

- Proposal for Council Regulation of the European Parliament and of the Council on the establishment of the European Public Prosecutor's Office (EPPO); and
- Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Co-operation (Eurojust)

Specifically, I understand you are seeking our views on whether these instruments may breach the principle of subsidiarity.

Our view is that they may.

In the case of the EPPO proposal, there is little or no evidence that consideration has been given to possibilities short of the creation of a new supra-national agency with extensive and harmonised powers. Given the emphasis placed in the Scottish system of the position of the Lord Advocate as the sole source of authority within the prosecution system, this is a matter of concern.

In the case of the Eurojust proposal, we acknowledge that Eurojust already exists and that in that sense the argument for its necessity has been established. However, the proposed reform could lead to National Members having powers which would not be subject to the discretion provided by the current arrangements, which enable certain powers not to be applied where they would be contrary to fundamental aspects of the criminal justice system. This is a matter of particular concern in a Member States such as the UK, where the National member would enjoy powers over three separate criminal justice systems, with no guarantee that he or she would be familiar with all of them.

For these reasons the Scottish Government is concerned that the principle of subsidiarity may not have been properly observed in either of the proposals.

I hope this information is helpful.

Kenny MacAskill
Cabinet Secretary for Justice
26 August 2013

Justice Committee

22nd Meeting, 2013 (Session 4), Tuesday 3 September 2013

Proposal for Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Co-operation (Eurojust) (12566/13)

Note by the EU Reporter

Purpose

1. The Committee is invited to consider whether the following EU legislative proposal meets the subsidiarity principle:

- Proposal for Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Co-operation (Eurojust)

2. The Convener and EU Reporter agreed to invite the Cabinet Secretary for Justice to attend this meeting to expand on the information he provided to the Committee in relation to the Scottish Government's position on the compliance of this proposal (and the proposal to establish a European Public Prosecutor's Office) with the subsidiarity principle. The Cabinet Secretary has agreed to attend.

Overview of proposal

3. This proposal reforms the EU body Eurojust, which was created in 2002 to support co-operation between Member States in cross-border criminal investigations and prosecutions. Along with the proposal to establish a European Public Prosecutor's Office (EPPO) set out in paper 2, this proposal is part of a package aimed at protecting the EU's financial interests. The proposal would retain many of the core functions of Eurojust. However, it makes reforms to the governance, accountability and management structure and sets out the working arrangements with the new EPPO.

4. The UK Government has yet to decide whether to opt in to the proposal.

5. Further information on the detail of the proposal is provided in the UK Government's Explanatory Memorandum at Annexe A.

Westminster scrutiny

6. Both the House of Lords EU Sub-Committee E (Justice, Institutions and Consumer Protection) and the House of Commons European Scrutiny Committee are to consider this proposal at meetings on Wednesday 11 September and so any decision by the Justice Committee is required at 3 September meeting.

Commission position

7. The Commission states that "there is a need for EU action because the measures foreseen have an intrinsic EU dimension, as they imply the creation of an entity whose mission is to support and strengthen co-ordination and co-operation between national judicial authorities in relation to serious crime affecting two or more Member States or

requiring a prosecution on common bases". It goes on to state that "this objective can only be achieved at Union level, in accordance with the subsidiarity principle".[1]

UK Government position

8. In its Explanatory Memorandum (attached as Annexe A), the UK Government states that there is an argument that the subsidiarity principle has been met because Eurojust is an existing EU agency. However it questions "the necessity of the proposal that all national members should have certain specified powers without the [current] discretion … which enables certain powers not to be applied where they would be contrary to fundamental aspects of the criminal justice system".[2]

Scottish Government position

9. In his letter of 26 August (attached as Annexe B), the Cabinet Secretary for Justice sets out the Scottish Government's view that this proposal **may** breach the principle of subsidiarity. He states that:

> "We acknowledge that Eurojust already exists and that in that sense the argument for its necessity has been established. However, the proposed reform could lead to National Members having powers which would not be subject to the discretion provided by the current arrangements, which enable certain powers not to be applied where they would be contrary to fundamental aspects of the criminal justice system. This is a matter of particular concern in a Member State such as the UK, where the National Member would enjoy powers over three separate criminal justice systems, with no guarantee that he or she would be familiar with all of them."

10. The Cabinet Secretary for Justice has agreed to attend the meeting to expand on this position.

Other devolved administrations

11. Neither the National Assembly for Wales nor the Northern Ireland Assembly intends to examine the proposal.

Recommendation

12. The Committee is invited to consider whether this legislative proposal meets the subsidiarity principle and to agree, that:

(a) the proposal ***does*** comply with the principle of subsidiarity. No further action would be required;

OR

(a) the proposal ***does not*** comply with the principle of subsidiarity. In this case, the Convener would then lodge a motion recommending that the Parliament agrees with this position. If the Parliament approves the motion, the Presiding Officer will inform both Houses of Parliament of the resolution.

OR

(c) the proposal ***may*** breach the principle of subsidiarity. The Committee could then write to the relevant Westminster committees highlighting its concerns.

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[1] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), paragraph 3.2. Available at: http://ec.europa.eu/justice/criminal/files/regulation_eurojust_en.pdf

[2] Explanatory Memorandum, paragraph 19.

ANNEXE A

12566/13
COM (2013) 532 final

EXPLANATORY MEMORANDUM (EM) ON JUSTICE AND HOME AFFAIRS MATTERS

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Union Agency for Criminal Justice Co-operation (Eurojust)

Submitted by the Home Office on 7 August 2013

SUBJECT MATTER

1. This Explanatory Memorandum (EM) concerns a proposal, in the form of a Regulation, from the European Commission to reform the European Union (EU) body Eurojust. Eurojust was established by Council Decision 2002/187/JHA, which was later amended by Council Decisions 2003/659/JHA and 2009/426/JHA. This new proposal would repeal and replace those existing measures. In doing so it would provide a single legal framework for the European Union Agency for Criminal Justice Co-operation (Eurojust) which would be the legal successor of Eurojust as it is now.

2. Eurojust was established in 2002 to support cooperation between Member States in cross-border criminal investigations and prosecutions, particularly in cases involving multiple jurisdictions. Its current role can involve advising on the requirements of different legal systems, supporting the operation of Mutual Legal Assistance (MLA) (judicial cooperation) arrangements, bringing together national authorities in coordination meetings, and providing funding and technical support to Joint Investigation Teams (JITs).

3. The new proposal retains many of the core functions, but also makes reforms to: the governance and management structure of the Agency; the powers of National Members; its accountability to the European Parliament and national Parliaments; and its working arrangements with a new body, the European Public Prosecutor's Office (EPPO). The EPPO would be established by a parallel proposal published simultaneously by the Commission as part of a package (see below). The Government has confirmed in its Coalition Agreement that it will not participate in the EPPO proposal, which is the subject of EM 12558/13.

4. The Commission had indicated its intention to bring forward a proposal to reform Eurojust, under Article 85 of the Treaty on the Functioning of the European Union (TFEU), for some time. It was referenced in their 2012 Work Programme. The proposal that has been published comes as part of the package from the Commission under the policy narrative of protecting the EU's financial interests. The associated elements of the package are a legislative proposal to create an EPPO (document 12558/13) and a Communication on *Improving OLAF's (the EU's anti-fraud office) Governance and reinforcing procedural safeguards in investigations: A step by step approach to accompany the establishment of the European Public Prosecutor's Office* (document 12555/13). The Eurojust and EPPO proposals have separate legal bases in the TFEU and can be considered as separate, albeit related, negotiations.

SCRUTINY HISTORY

5. Dossier 10663/08 – An EM on draft Council Decision on the strengthening of Eurojust amending Council Decision 2002/187/JHA of 28 February 2002, as amended by Council Decision 2003/659/JHA, setting up Eurojust with a view to reinforcing the fight against serious crime was deposited on 26/06/2008. It cleared the Commons on 02/07/2008 as legally and politically important cleared the Lords on 16/07/2008.

MINISTERIAL RESPONSIBILITY

6. The Home Secretary has responsibility for policy on policing and the fight against crime (except in Scotland and Northern Ireland), including mutual legal assistance and extradition. The Justice Secretary and Attorney General have an interest in respect of the criminal justice system, and the Chancellor of the Exchequer also has an interest in respect of the budget of the European Union and OLAF.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

7. Scotland and Northern Ireland have an interest and the Devolved Administrations have been consulted in the preparation of this EM.

LEGAL AND PROCEDURAL ISSUES

Legal base

8. Articles 85 of the Treaty on the Functioning of the European Union.

9. This proposal triggers the JHA opt-in (Protocol 21 to the Treaties) and the UK will therefore have three months from the date of publication of the final language version of the proposal to decide whether to participate.

European Parliament procedure

10. The proposal for a Regulation will be subject to the ordinary legislative procedure i.e. what was formerly co-decision.

Voting procedure in the Council

11. Qualified Majority Voting.

Impact on United Kingdom law

12. Elements of these proposals include requiring all Eurojust National Members to be given powers to order investigative measures or authorise and coordinate controlled deliveries in certain circumstances. This would require changes to criminal justice systems within the UK, particularly with regard to the separation of functions as between law enforcement and prosecutors in England, Wales and Northern Ireland. Similarly, these proposals would also require changes to criminal justice arrangements in Scotland, where law enforcement has separate functions, although the prosecutor can direct the police in relation to investigations.

Application to Gibraltar

13. If the UK chooses to exercise its JHA opt-in in respect of the new Regulation, it will automatically apply to Gibraltar in accordance with the Treaties.

Fundamental Rights Analysis

14. It is the Government's view that this Regulation engages Article 7 (respect for private and family life), Article 8 protection of personal data), Article 17 (right to property), Article 42 (right to access to documents), Article 48 (presumption of innocence and right of defence) and Article 50 (right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter of Fundamental Rights. Any engagement with these rights must be justified in accordance with Article 52 of the Charter. The criteria for such a justification are the following: the interference must be provided for by law and respect the essence of the particular right in question; and the interference must comply with the requirements of necessity and proportionality.

15. The data exchange provisions in this proposal risk interfering with rights enshrined under Article 7 (respect for private and family life), Article 8 (protection of personal data), Article 17 (right to property) and Article 42 (right to access to documents) of the Charter. Some of the language in the Eurojust proposal seems to provide scope and flexibility for Member States to provide conditions and restrictions on the use and processing of data provided to Eurojust, which illustrates that there are mechanisms to restrict the use of data where the sharing of it is not strictly necessary or proportionate. The purpose of Eurojust's data exchange and processing powers appear to be directly related to its general functions. However, given that both the draft EU Data Protection Directive and Regulation dossiers are currently under negotiation themselves, it is difficult to assess the full implications of the data protection provisions in the Eurojust proposal at the moment.

16. There is a risk that providing the National Members with mandatory powers to order investigative measures, issue and execute MLA requests, authorise and coordinate controlled deliveries and participate in joint investigation teams (JITs), for example, will interfere with the private and personal property rights mentioned above *and* the rights of the defence and the principle of *ne bis in idem* as enshrined in Articles 48 and 50 of the Charter. This is because the powers set out in the Eurojust proposal could, for example, lead to an MLA request being executed by a National Member without agreement with the competent national authorities and without sufficient regard for Charter rights. For example, a Greek National Member could, without consulting the Greek competent national authorities, executive an MLA request from Poland for the search and seizure of a suspect's home in relation to an offence that he has already been convicted for, which would, of course, not respect Article 50 of the Charter. Therefore, further analysis will need to be done on the extent of the restrictions and safeguards in place for the exercise of these newly drafted powers and the impact that this may have on the Charter rights of affected individuals. Article 7(3) states that it is for the competent national authorities to grant the National Members with the relevant powers outlined in the Regulation but there is no corresponding provision which subjects such powers to the same conditions and restrictions that are set out in national law. It is also arguably unnecessary and disproportionate to grant the National Members these mandatory powers if the discretionary powers set out in the current Eurojust measure work effectively as they are now.

17. It should also be noted that although Recital 8 of the proposal confirms that the Eurojust proposal respects Charter rights, there is currently an absence of a

substantive provision within the main body of the text that states that the activities of Eurojust and National Members should in all instances be carried out in full respect of Charter rights.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

18. Not applicable

SUBSIDIARITY

19. Given Eurojust is an existing EU Agency it can be argued that the case for subsidiarity has been met. However, the Government questions the necessity of the Commission's proposal that all National Members should have certain specified powers without the discretion afforded by the current Council Decision, which enables certain powers not to be applied where they would be contrary to fundamental aspects of the criminal justice system.

POLICY IMPLICATIONS

20. The Government has said previously that the current Eurojust Council Decision should be evaluated before a new proposal is brought forward. The Government notes, however, that the Commission has published its proposal before the ongoing evaluation is completed, where that is not due to be completed until next year.

Application of the JHA Opt-in

21. In accordance with the Protocol on the position of the UK and Ireland in respect of the area of Freedom Security and Justice, annexed to the Treaties, this Regulation will only apply to the UK if we choose to opt in to it. The deadline for making that decision will be provided to the Committees as soon as we receive the date of the publication of the last language version but will not be earlier than 16 October, i.e. 3 months from the day the Commission College presented the proposal.

22. The Government is committed to taking all opt-in decisions on a case-by-case basis, putting the national interest at the heart of our decision making. The Government decision on the exercise of the opt-in in relation to this proposal will consider whether participation in the measure as drafted would benefit the security of the UK and its citizens including the protection of their civil liberties and rights as well as the extent of the impact on our criminal justice systems. The Government has said that it sees the current Eurojust measures as a positive model of cross-border co-operation. That is why the Government has announced it will seek to rejoin the current Eurojust measures as part of the decision on Protocol 36 to the Treaties (the 2014 decision). However, we are concerned by elements of the new proposal, particularly to extend the powers of National Members and what this will mean at an operational level.

23. We expect this proposal will be of particularly strong interest to Parliament and therefore, in line with the Minister for Europe's statement of 20 January 2011, the Government can confirm our commitment to offer Government time for a debate on the opt-in decision, known as a 'Lidington' debate.

Structure and governance of Eurojust

24. The Commission's proposed reforms to Eurojust's structure do not include the creation of a Management Board with a Director, which is the common model for EU Agencies

as described *'in the common approach to EU decentralised Agencies',* which has been agreed by the UK Government. Instead, the reforms centre on the creation of an Executive Board, whilst retaining the current model of a College of National Members headed by a President (elected by the College) to oversee Eurojust's collective management and operational responsibilities.

25. The Executive Board would consist of: the President and Vice Presidents of the College, one representative of the Commission and one other representative of the College. This deviation from the common approach to EU decentralised Agencies is explained by the Commissioner on the basis that the retention of the College is necessary for operational functions, whilst the introduction of an Executive Board would support the administration and overall management of the agency. The Executive Board would have responsibility for certain administrative decisions, such as rules relating to staff regulations, and assisting the College with its management functions (described in Article 14), such as adoption of Eurojust's programming document and budget.

26. The Government notes in particular the proposal for the Executive Board to prepare the decisions to be adopted by the College in accordance with Article 14. When the College takes management decisions, the Commission's proposal also foresees two representatives of the Commission sitting on the College. The Government will want fully to explore the Commission's rationale for not creating a Management Board, similar to that of Europol, and examine carefully how the Executive Board would operate in practice. We have some concerns about whether the model proposed is best suited to good governance. Additionally, the risk remains that involvement of National Members in management decisions will continue to detract them from core operational casework.

27. The Government also noted that the European Public Prosecutor shall receive agendas of all Executive Board and Collect meetings and is free to participate but not vote in meetings that he or she considers of relevance to the functioning of the EPPO. The EPP may address written opinions to the Executive Board and the College which are to be responded to in writing without delay. There are no corresponding provisions for the Eurojust President to attend EPPO meetings or address opinions to the EPP in the EPPO Regulation and the Government questions this disparity.

<u>Powers of National Members</u>

28. The Commission proposal (Article 8) requires that all National Members shall be given certain powers. In particular, Article 8(2) and (3) would require National Member to be given the power to order investigative measures and authorise and co-ordinate controlled deliveries either "in agreement" with competent authorities or without prior agreement in urgent cases. This is a significant issue since it would remove the discretion currently available to Member States not to grant certain powers to their National Members where to do so would, for example, be contrary to fundamental aspects of a Member State's criminal justice system.

29. The mandatory power for National Members to order investigate measures and/or authorise and co-ordinate controlled deliveries is inconsistent with the common law systems in England, Wales and Northern Ireland. The UK National Member is a prosecutor (and we believe a prosecutor is best suited to the role), but the responsibility for ordering investigative measures (including making an application to court) and authorising and coordinating controlled deliveries is the responsibility of law enforcement officials. Similarly, these proposals are also inconsistent with criminal

justice arrangements in Scotland, where law enforcement has separate functions, although the prosecutor can direct the police in relation to investigations.

30. Additionally, Article 8(1) would require all National Members to be given the powers to facilitate or otherwise support the issuing and execution of any mutual legal assistance or mutual recognition request, or issue and execute them themselves. The Government will want to explore the Commission's rationale, and evidence base, for such mandatory powers. The UK's practices regarding the ordering of investigative measures and controlled deliveries is established, structured, and works well. Even with these powers in place, it is highly unlikely the UK National Member would ever wish or need to use them.

Joint Investigation Teams (JITS)

31. Although JITs are established under a separate EU instrument, Eurojust has in recent years been responsible for administering an EU JIT funding project, although that will shortly expire. Between December 2009 and July 2013, UK applications for JIT funding from Eurojust led to receipt of around £1.56m. The draft Regulation includes provision for Eurojust to continue funding in Article 4(1)(e), which is welcome.

Operational functions of Eurojust

32. As under the arrangements, Eurojust (acting either as College or through the national desks), may ask Member States to:

a) undertake an investigation or prosecution of specific acts;
b) accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;
c) coordinate between the competent authorities of the Member States concerned;
d) set up a joint investigation team in accordance with the relevant cooperation instruments;
e) provide it with any information that is necessary to carry out its tasks;
f) take special investigative measures; and
g) take any other measure justified for the investigation or prosecution.

33. The College can also issue 'written opinions' to help resolve conflicts of jurisdiction between Member States, or on 'recurrent refusals or difficulties' regarding execution of mutual legal assistance requests. In the current arrangements, if the recipient authority of such a request or opinion does not follow it, they must 'inform Eurojust without undue delay of their decision and the reasons for it'.

34. This is replicated in the new proposal, albeit in Article 23, where the initial requests from Eurojust are dealt with in Article 4(2), and there is an argument for consolidating these provisions for ease of reference. Article 23 of the proposed Regulation also retains the existing right to not give a reason, other than citing "operational reasons", where to provide more would harm essential national security interests or would jeopardise the safety of individuals. The draft Regulation does however lose the explicit reference to College decisions being 'non-binding'; we will want to ensure in negotiations however that College opinions are indeed non-binding.

Legal personality and capacity

35. The Government notes that there has been a change in the wording of the provision which deals with the legal personality and capacity of Eurojust. The current Eurojust instrument says that "*Eurojust shall have legal personality"*, whereas the new proposal

says "*In each of the Member States, Eurojust shall enjoy the most extensive legal capacity accorded to legal persons under their laws"* (Article 1(3)). Although it appears this could have the effect of increasing the legal capacity of Eurojust in some Member States, the purpose and full implications are not yet clear. The Government will seek full clarification on this in negotiation.

Relations with other bodies

EPPO

36. The Government has made clear that it will not participate in the Commission's parallel EPPO proposal, as confirmed in the Coalition Agreement. The draft Eurojust Regulation envisages a "special relationship" between the EPPO and Eurojust. The Government will want to examine the Commission's proposals for the interaction of these two bodies very carefully during negotiation.
37. The Commission has interpreted the obligation in Article 86 TFEU to establish the EPPO "from Eurojust" by creating an "operational, administrative and management link" between them. This includes the following:

- The ability of the EPPO to request Eurojust or its competent National Members to use their powers under Union or national law regarding acts of investigation that may fall outside the EPPO's scope of competence and/or to support the transmission of EPPO requests or decisions for Mutual Legal Assistance.
- The ability for the EPPO to attend Eurojust College and Executive Board meetings (Article 12(3) and 16(7) & (8));
- Eurojust treating any respects for support from the EPPO as if they had been received from a national competent authority (Article 41(2));
- Exchanging information, including personal data;
- Automatic cross-checking of data held by Eurojust and the EPPO on a shared Eurojust Information Technology (IT) platform known as the Case Management System;
- A role for Eurojust in "facilitating agreement" between the EPPO and Member States that participate in the EPPO over the EPPO's competence on "ancillary offences" – i.e. offences linked to offences against the EU's financial interests; and
- Use by the EPPO of elements of Eurojust's administration and infrastructure.

38. The Eurojust and EPPO proposals as published by the Commission would also see the EPPO have exclusive competence for offences against the EU's financial interests (PIF offences). As drafted the EPPO proposals would appear to mean that Eurojust would no longer have responsibility for PIF offences. This does not take into account, however, of the fact that the UK will not participate and Denmark cannot participate in the EPPO, and will need to be fully examined in negotiation.

Europol

39. The draft Eurojust Regulation provides for the enhancement of operational cooperation between Europol and Eurojust (Article 40) in relation to the exchange of information within their respective mandates. It proposes that indirect access to Eurojust data should be granted to Europol on a "hit/no hit" basis. Eurojust would only share information subject to the authority granted by the Memebr State or law enforcement body that originally provided the information, though such consent would be presumed unless the Member State placed explicit restrictions on the onward transmission of the information. The draft Regulation would restrict searches of its information to designated employees of Europol.

40. An agreement between Europol and Eurojust already exists within the framework of the current Council Decisions governing each organisation. The Government believes that it is sensible for the two organisations to co-ordinate in order to avoid duplication

in their respective roles and to ensure an effective, joined up response to the criminality affecting the UK and other Member States.

Enhanced Parliamentary Scrutiny

41. The draft Regulation also seeks to enhance and lay down the rules governing the European Parliament's and national Parliament's scrutiny of Eurojust (Article 55), and seeks to ensure that consultation is undertaken adequately. The draft proposal stipulates that the President of Eurojust shall appear before the European Parliament. Eurojust would also be obliged to transmit the results of studies and strategic projects elaborated or commissioned by Eurojust, working arrangements concluded with third parties, the annual report of the European Data Protection Supervisor and its own Annual Report to national Parliaments.

42. In general, these proposals are in line with the common approach to EU decentralised Agencies that has been agreed by the UK Government. However, we would take a cautious approach to the disclosure of classified information given the operational sensitivity of law enforcement intelligence. The Government would want assurances in this area.

Third Country cooperation agreements

43. Another key change between the Eurojust Regulation and the current measures is to transfer the power to negotiate third country cooperation agreements from Eurojust, relying instead on the standards provisions in the TFEU. There is no provision for Eurojust to negotiate agreements in its own right, as it is currently able to do. We believe that the Commission will argue that this reflects the position on third country negotiations following the Lisbon Treaty. Article 216 of the TFEU states that *"[t]he Union may conclude an agreement with one or more third countries or international organisations where… [it] is provided for in a legally binding Union act"*. The Government's view, however, is that this does not prevent individual EU agencies such as Eurojust being given the power to negotiate their own agreements, which may be important in supporting efforts to cut crime.

Liaison Magistrates posted to Third Countries

44. The Government notes that the provisions here are very similar to the current Eurojust measure, but given the context of this new negotiation and the reforms to Eurojust we will want to examine the implications carefully in negotiation. Eurojust has yet to post a Liaison Magistrate to a third country.

Relations with European Judicial Network

45. The provisions broadly replicate the current measure.

Data protection – abolition of Joint Supervisory Body

46. Under the current Eurojust Council Decision, the Joint Supervisory Body is responsible for the independent monitoring of Eurojust's data protection compliance. The draft proposal would abolish this body and instead make Eurojust subject to the jurisdiction of the European Data Protection Supervisor (EDPS). As a whole, data protection provisions in the proposal focus on internal Eurojust policies rather than obligations on Member States in numerous Articles between 27 and 37. References deal with how Eurojust ensures appropriate safeguards to guarantee data security and the

responsibilities of the Agency in relation to national supervisory authorities and the European Data Protection Supervisor (EDPS).

47. The Commission's intention is to enable Eurojust better to establish links between data already in its possession. In the view of the Commission, the rights of individuals affected by data processing by Eurojust will be strengthened.

48. The full implications of the data protection provisions are currently unclear given that both the draft EU Data Protection Directive and Regulation dossiers are currently under negotiation themselves and will need to be agreed by Member States and the European Parliament. Some of the language in the draft text seems to mirror these data protection proposals, suggesting scope and flexibility for Member States to provide conditions and restrictions on the use and processing of data which they have provided to Eurojust. However, we take a cautious approach with respect to the data protection principles contained within this draft Regulation since the data protection dossiers, when agreed at EU level, will set the direction for those principles to be applied to Member States.

Exchange of information with Member States and between National Members

49. The provisions her are almost identical to the current Eurojust measures, and in particular retain the right not to provide information in a particular case where it would harm essential national security interests or jeopardise the safety of individuals. However, the ongoing evaluation round of the implementation of the current Council Decision has shown that the working of the current provisions is not necessarily well suited to the operational environment. Therefore, the Government will want to ensure that the drafting of this text is appropriate for operational partners.

IMPACT ASSESSMENT

50. The Government has noted that the Commission has not published a bespoke Impact Assessment (IA) for their Eurojust proposal. This is inconsistent with accepted practice and we will seek an explanation from the Commission.

FINANCIAL IMPLICATIONS

51. As there has not been a dedicated IA from the Commission it is problematic to examine the financial implications on the basis of the proposal alone. One issue we have identified is that Member States that do not participate in the EPPO proposal, but do participate in Eurojust will want to ensure appropriate recharges for any costs incurred as a result of the reliance by EPPO on the support and resources of the administration of Eurojust including technical support in the preparation of its budget and management plan, human resources, security services, information technology and financial management, accounting and auditing services. We are also concerned about the consequential impact on the level of service provided to Eurojust National Desks.

CONSULTATION

52. The Crown Prosecution Service, The Serious Organised Crime Agency, Border Force, College of Policing, the Ministry of Justice, Her Majesty's Revenue & Customs, Her Majesty's Treasury, the Metropolitan Police Service, the Devolved Administrations, the Crown Office and Procurator Fiscal Service, the Public Prosecution Service for Northern Ireland and Gibraltar have been consulted in the drafting of this EM.

TIMETABLE

53. This proposal is expected to be presented by the Commission at the Justice and Home Affairs Council in October and then be discussed at working group level. The Government will keep Parliament informed of developments.

Mark Harper
Minister of State for Immigration
HOME OFFICE

ANNEXE B

Correspondence from the Cabinet Secretary for Justice in relation to the subsidiarity concerns regarding EU legislative proposals on establishment of a European Public Prosecutor's Office and reform of Eurojust

I understand your Committee is seeking the views of the Scottish Government on the following proposed European instruments:-

- Proposal for Council Regulation of the European Parliament and of the Council on the establishment of the European Public Prosecutor's Office (EPPO); and
- Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Co-operation (Eurojust)

Specifically, I understand you are seeking our views on whether these instruments may breach the principle of subsidiarity.

Our view is that they may.

In the case of the EPPO proposal, there is little or no evidence that consideration has been given to possibilities short of the creation of a new supra-national agency with extensive and harmonised powers. Given the emphasis placed in the Scottish system of the position of the Lord Advocate as the sole source of authority within the prosecution system, this is a matter of concern.

In the case of the Eurojust proposal, we acknowledge that Eurojust already exists and that in that sense the argument for its necessity has been established. However, the proposed reform could lead to National Members having powers which would not be subject to the discretion provided by the current arrangements, which enable certain powers not to be applied where they would be contrary to fundamental aspects of the criminal justice system. This is a matter of particular concern in a Member States such as the UK, where the National member would enjoy powers over three separate criminal justice systems, with no guarantee that he or she would be familiar with all of them.

For these reasons the Scottish Government is concerned that the principle of subsidiarity may not have been properly observed in either of the proposals.

I hope this information is helpful.

Kenny MacAskill
Cabinet Secretary for Justice
26 August 2013

Justice Committee

22nd Meeting, 2013 (Session 4), Tuesday 3 September 2013

EU issues

Note by EU Reporter

Purpose

1. The Committee is invited to note recent developments in relation to EU issues.

UK Government's 2014 opt-out decision

2. Under Protocol 36 of the Lisbon Treaty, the UK Government must, by 31 May 2014, decide whether to opt in or out of around 130 police and criminal justice measures which were adopted prior to the Lisbon Treaty. If the UK Government was to opt in, the measures would continue to apply to the UK, but would also come under the full jurisdiction of the European Court of Justice and the enforcement powers of the European Commission would apply. Either decision would take effect from 1 December 2014.

3. Since the Home Secretary's announcement[1] on 15 October 2012 that the UK Government's thinking at that time was to opt out of the pre-Lisbon measures, the Committee has been actively monitoring developments with this situation.

4. A joint inquiry into the 2014 opt-out decision by House of Lords EU Sub-Committees E and F[2] reported on 23 April 2013, concluding that the UK Government had not made a convincing case for exercising the opt-out. The report goes on to state that "opting out … would have significant adverse negative repercussions for the internal security of the United Kingdom and the administration of criminal justice in the United Kingdom".[3] Given that this inquiry included taking evidence from the Lord Advocate and a number of Scottish organisations, including ACPOS and the Faculty of Advocates, the Committee agreed not to undertake any additional evidence-gathering on the potential impact of the opt-out decision on Scotland at that stage, in order to avoid any duplication.

5. The Cabinet Secretary for Justice, in a letter to House of Lords Sub-Committees E and F of 1 May (at Annexe A) endorsed the key findings of their report. He confirmed that "the Scottish Government does not support the UK Government's preferred position to opt out of these measures or how this decision has been progressed to date" and advised that he had written to UK Ministers in August 2012 "making clear that the Scottish Government's preferred position is to remain fully within these important EU measures". The Scottish Government's Action Plan on European Engagement published in July 2013 states that "while it remains the Scottish Government's position that there is no justification for exercising this

[1] BBC website (15 October 2012). *Theresa May tells MPs UK Government wants EU law opt-out*. Available at: http://www.bbc.co.uk/news/uk-politics-19944072

[2] House of Lords EU Sub-Committee E examines Justice, Institutions and Consumer Protection. House of Lords EU Sub-Committee F examines Home Affairs, Health and Education.

[3] House of Lords. (23 April 2013) *EU police and criminal justice measures: the UK's 2014 opt out decision.* Paragraph 275. Available at: http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeucom/159/159.pdf

opt-out, we will work constructively with the UK Government to ensure key measures and protections will not be lost and to minimise the risks posed by this decision".[4]

6. On 9 July 2013, the Home Secretary announced a list of 35 individual measures that the UK Government would seek to re-join should the opt-out be exercised. As this list of measures was not available during their original inquiry, the HoL EU Sub-Committees E and F decided to reopen their inquiry to further examine these developments, with a closing deadline of 11 September 2013 for written submissions.

7. Debates and votes on the opt-out were held in both Houses during July 2013, with both endorsing the UK Government's decision to opt out of the pre-Lisbon Treaty measures. The UK Government has committed to holding further debates and votes on the final package of measures to opt back into following the conclusion of the Government's negotiations with the Commission and Council. These negotiations are not expected to conclude before the end of the year.

8. The Committee is asked to note these developments and to agree to consider whether to take any action following the reopened House of Lords inquiry. For example, the Committee could at a later date agree to seek written views or take evidence from the Cabinet Secretary for Justice and/or the Lord Advocate.

Establishment of a European Public Prosecutor's Office

9. On 29 January 2013, the Committee agreed to monitor developments with a number of EU proposals contained in the 2013 Commission Work Programme, including a proposal to establish a European Public Prosecutor's Office (EPPO) to protect the financial interests of the EU. At that meeting, the Committee agreed to write to the Cabinet Secretary for Justice seeking his views on how an EPPO might impact on the Scottish criminal justice system.

10. In his response of 7 March 2013 (at Annexe B), the Cabinet Secretary stated that, as the full detail of this proposal was not yet available, he was "not in a position to give an account of its potential impact on the Scottish criminal justice system". However, he did highlight that "there are likely to be concerns about the relative role of an EPPO and Scotland's own independent prosecution service". He further confirmed that the UK Government does not intend to participate in this proposal and that, in order to proceed, the proposal requires unanimity from all member states. Therefore, he did "not expect the current proposals for an EPPO to have any immediate direct impact on the Scottish criminal justice system".

11. In correspondence of 19 July 2013 (at Annexe C), the Cabinet Secretary updated the Committee that the European Commission had published its draft proposals for the creation of the EPPO on 17 July.

12. House of Lords EU Sub-Committee E on Justice, Institutions and Consumer Protection is expected to undertake an inquiry into the potential impact of the EPPO on the UK, given that it does not intend to participate in the proposal.

[4] Scottish Government (July 2013. *Action Plan on European Engagement*. Available at: http://scotland.gov.uk/Resource/0042/00429746.pdf

13. The UK and Scottish governments have raised concerns as to whether the proposal meets the subsidiarity principle. The Committee is due to consider the proposal only in terms of its compliance with the principle of subsidiarity at its meeting on 3 September (paper 2). Should the Committee wish to examine the detail of the proposal, it could do so separately at a later date.

14. The Committee is invited to note the developments in relation to the proposal to establish the EPPO set out above.

Other EU issues

15. In January 2013, the Committee identified two further EU proposals of interest in the 2013 Commission Work Programme:

- Special safeguards in criminal procedures for suspected or accused persons who are vulnerable; and
- Transmission and serving of legal documents in other Member States.

16. The Committee agreed to return to them later in the year, once full details of the proposals were available. It is understood that the proposals are now expected in the Autumn.

17. The Committee is invited to agree to return to the two proposals once published in the Autumn.

ANNEXE A

Correspondence from the Cabinet Secretary for Justice to House of Lords European Union Committee in relation to its inquiry into the UK 2013 opt out decision

Thank you for your letter of 22 April 2013. I am very grateful for a copy of the House of Lords Select Committee report of its inquiry on this important matter. In the absence of a UK Government public consultation, I believe the report to be a highly significant and defining contribution to the debate, particularly in view of the substantive evidence taken from a range of authoritative sources, including from relevant organisations here in Scotland.

I endorse strongly the report's findings, including that cross-border co-operation is an essential element in tackling problems such as organised crime and terrorism, that the most effective way for the UK to co-operate with other Member States is to remain engaged in the existing EU measures in this area, and that the UK Government has not made a convincing case for exercising the opt out.

I also note and agree the Committee's conclusion that the UK Government would have been wise to have sought the views of the Scottish Government and other Devolved Administrations before announcing publicly their provisional decision in favour of opting out. As set out in my evidence to the Committee, this is particularly relevant given the potential negative repercussions of the opt out for the operation of the separate devolved justice system and agencies here in Scotland and within the other Devolved Administrations.

To be clear, the Scottish Government does not support the UK Government's preferred position to opt out of these measures or how this decision has been progressed to date. I wrote to UK Ministers in August 2012 making clear that the Scottish Government's preferred position is to remain fully within these important EU measures.

I note that the Committee plans to host a seminar on the report on 5 June. Again, I think this will be a helpful contribution to open debate on this issue. I would be grateful if the Scottish Government could be represented at the seminar by officials.

Kenny MacAskill
Cabinet Secretary for Justice
1 May 2013

ANNEXE B

Correspondence from the Cabinet Secretary for Justice to the Committee in relation to the EU legislative proposal to establish a European Public Prosecutor's Office (EPPO)

Thank you for your letter of 31 January enquiring about how the establishment of a European Public Prosecutor's Office (EPPO) might impact on the Scottish criminal justice system.

As you note, the establishment of an EPPO is included in the Lisbon Treaty. However, that Treaty does not give details of its proposed operation. The final draft procedural rules for the EPPO will be brought forward by the Commission later this year, probably in June. Given that the full detail of this proposal is not yet available, the Committee will understand that I am not in a position to give an account of its potential impact on the Scottish criminal justice system. I am aware that there are likely to be concerns about the relative role of an EPPO and Scotland's own independent prosecution service. My officials will keep in touch with their counterparts in the Crown Office about this issue and ensure that the views of Law Officers are taken into account in considering the proposal.

As you will be aware, following the Lisbon Treaty, the UK has a right to opt into or out of individual justice measures. The UK Government has indicated previously that it does not intend to opt in to the EPPO. Further, under section 6 of the European Union Act 2011, Ministers of the Crown may not vote in favour of participation in the EPPO without an Act of the UK Parliament and the consent of the majority of those voting in a referendum.

Moreover, the proposal for an EPPO has to be brought forward under a 'special legislative procedure' requiring unanimity. Aside from the UK's position, my understanding is that a number of other member states appear likely to raise reservations.

Taking account of these circumstances, I do not expect the current proposals for an EPPO to have any immediate direct impact on the Scottish criminal justice system. I recognise the Committee's interest in this matter and will aim to keep you informed if there are significant further developments.

I hope this information is of assistance to Committee members.

Kenny MacAskill
Cabinet Secretary for Justice
7 March 2013

ANNEXE C

Further correspondence from the Cabinet Secretary for Justice to the Committee in relation to the EU legislative proposal to establish a European Public Prosecutor's Office (EPPO)

You wrote to me on 31 January 2013 advising that work on the establishment of a European Public Prosecutor's Office (EPPO) would be a priority for your Committee this year. In my reply of 7 March I promised to keep you informed if there were significant developments.

The European Commission published its draft proposals for the creation of the EPPO on 17 July. The proposal may be found at:-

http://ec.europa.eu/justice/criminal/files/regulation_eppo_en.pdf

When I wrote to you on 7 March I described the obstacles to UK participation in the EPPO. These remain unchanged.

I hope this information is helpful.

Kenny MacAskill
Cabinet Secretary for Justice
19 July 2013