

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

CM1905 Note of the Meijers Committee on the extension of the competence of the European Public Prosecutor's office to terrorist offences

13 March 2019

Introduction

In its State of the Union of 2018, the European Commission announced that it would take the initiative in a discussion on extending the competences of the European Public Prosecutor's Office beyond criminal offences that affect the financial interests of the European Union. In its view, the Office should also be made competent for cases of cross-border terrorism. In its Communication (COM)2018 641), the European Commission proposes that the European Council and the European Parliament make use of their powers under Article 86 paragraph 4 TFEU, and amend Article 86 paragraphs 1 and 2 TFEU. According to the European Commission, this is to be done in such a way that the Treaty will enable the future European Public Prosecutor's Office to prosecute cases of terrorism before the criminal courts of the Member States participating in the European Public Prosecutor's Office. The Meijers Committee wishes to make some remarks regarding this initiative.

Need and proportionality

In its communication, the European Commission refers to the nature of terrorism, presenting one of the most significant challenges to our societies. The fight against terrorism therefore needs a comprehensive and structural Union response, including the investigation and prosecution of terrorist offences across the EU. The European Commission takes the view that current efforts against terrorism in the European Union are insufficient. This includes the existence of gaps in information exchange, co-ordination and co-operation of national authorities. While the European Commission concedes that fighting terrorism is considered a high priority by the Member States, it signals that national authorities take a narrow, national perspective to terrorist cases, providing hurdles to effective investigations. In the Commission's view, it would be an improvement if the European Public Prosecutor's Office would be made competent to take over investigations and prosecutions of terrorist offences.

The Meijers Committee notes that there is no or at best little empirical evidence in the Commission's analysis of the extent to which the fight against terrorism is currently hampered by the lack of a European Public Prosecutor's Office competent for these matters. For certain, due to the fact that the European Public Prosecutor's Office is currently being established and not yet operational, there is a complete lack of evidence as to its effectiveness in fighting serious crimes. Moreover, if a lack of exchange of information, co-ordination and co-operation are the main problems, the solutions for these problems must be found in improving the exchange of information, and the modes of co-ordination and co-operation. The Meijers Committee wishes to point out that there is currently much activity relating to improving the exchange of information in regard to terrorism, e.g. through the interoperability of law enforcement databases. Moreover, the essential European bodies for co-operation and co-ordination in the area of criminal law enforcement are already established: Europol and Eurojust. Since the reform of these bodies has been ongoing, it would be preferable to evaluate their functioning in terrorism cases, and perhaps enhance their tasks and powers, before contemplating the enlargement of the competence of the European Public Prosecutor's Office.

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Finally, such an extension is inappropriate because of the nature of the European Public Prosecutor's Office, as it is designed to overcome the unwillingness of national authorities to investigate and prosecute cases of fraud against the Union's financial interests. As the European Commission rightly indicates, there is no unwillingness in the Member States to counter terrorist offences. Therefore, it is not very likely that the European Public Prosecutor's Office is the appropriate tool to improve the fight against terrorism. At the very least, an extension of competences should be only considered after the European Public Prosecutor's Office has been active for a considerable amount of time in the fight against offences damaging the Union's financial interests, and its functioning has been properly evaluated. Only then there can be an informed estimation of its actual suitability for the fight against terrorism. Such an approach would be in line with the European Commission's own Better Regulation Agenda. The Meijers Committee therefore recommends that the choice for the appropriate institution be given additional attention.

Proposed change of Article 86 TFEU

Article 86 paragraph 4 TFEU enables the European Council to adopt a decision amending Article 86 paragraph 1 TFEU in order to extend the powers of the European Public Prosecutor's Office to include 'serious crime having a cross-border dimension'. In addition, it enables the European Council to amend accordingly Article 86 paragraph 2 TFEU as regards 'the perpetrators of, and accomplices in, serious crimes affecting more than one Member State'.

In its initiative, the Commission proposes that Article 86 paragraph 1 TFEU is amended, in such a way that it refers to 'terrorism' in addition to 'crimes affecting the financial interests of the Union', which is currently the single offence for which the European Public Prosecutor's Office can be competent. Next to that, the Commission proposes that Article 86 paragraph 2 TFEU is amended, and will read: 'The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences of terrorism affecting more than one Member State and offences against the Union's financial interests (...)'.

Remarkably, the proposed change of Article 86 paragraph 1 is not explicitly restricted to cases of terrorism having a cross-border dimension, since it refers simply to 'terrorism'. The reason why Article 86 paragraph 1 TFEU would have such a scope, including non-cross-border cases is not clear. It is questionable whether this enlargement is justified in the light of the referral in Article 86 paragraph 4 TFEU to 'serious crime having a cross-border dimension'.

Moreover, Article 86 paragraph 4 TFEU empowers the European Council to extend the European Public Prosecutor's Office's powers under Article 86 paragraph 2 TFEU to 'serious crimes affecting more than one Member State'. This is to be distinguished from the phrase 'serious crime having a cross-border dimension', which applies in regard to possible changes in Article 86 paragraph 1 TFEU. These are different concepts. After all, a crime can have a cross-border dimension when it for example impacts a Member State and a third country. In that case, there is a cross-border dimension while the crime does not affect more than one Member State. The Commission's proposal seems to conflate these two different possibilities for amendment which are enclosed in Article 86 paragraph 4 TFEU.

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In addition to this, recital 2 of the European Commission's draft for a European Council Decision clearly refers to the condition 'having a cross-border dimension' in the perspective of harmonization of substantive criminal law according to Article 83 paragraph 1 TFEU. Even if it is the case that the conditions in Article 86 paragraph 4 and Article 83 paragraph 1 TFEU should be interpreted identically, recital 2 does not make it very clear why the nature of terrorism necessarily gives it a cross-border dimension. More importantly however, while a cross-border dimension can, according to Article 83 paragraph 1 TFEU, be the result of the need to combat a certain crime on a common basis, that reasoning cannot be used in the exact same way in the context of the European Public Prosecutor's Office. In that context, the 'common basis' cannot refer to offence definitions and sanctions, as it does in Article 83 paragraph 1. This is already evident from recital 2 of the European Commission's draft, which refers to 'the need for a comprehensive European response to terrorism'. A comprehensive response is certainly not the same thing as a common offence definition. The Meijers Committee therefore recommends that the legal basis for the amendment be further analysed and the proposal amended accordingly.