

Courtesy translation

date 3 June 2014
Subject Comments and questions concerning the yellow card procedure
our reference 153768.05u

Dear Mr Šefčovič,

On 17 October 2013, the Dutch Senate of the States General submitted a reasoned opinion, agreed by a majority of its members, on the Commission's proposal regarding the establishment of a European Public Prosecutor's Office to the European Commission.¹ In the light of the discussion of the European Commission's responses dated 27 November 2013² and 13 March 2014³, the standing committees for Immigration & Asylum (I&A)/Justice and Home Affairs Council (JBZ-Raad) and Security and Justice (V&J) informed the European Commission on 24 April 2014 that the majority of their members were in agreement with the critical letter addressed to the European Commission on 16 April 2014 by the Dutch House of Representatives of the States General.⁴

In the letter from the House of Representatives of 16 April 2014, as well as in letters from other national parliaments⁵, disappointment was expressed about the way in which the European Commission handled the objections raised by the national parliaments and which resulted in the instigation of a yellow card procedure. This dissatisfaction was also expressed at interparliamentary meetings, including the joint JBZ committee meeting in Brussels on 19 March 2014 and the Conference of Speakers of European Union Parliaments in Vilnius on 6-8 April 2014. The sense of dissatisfaction about the European Commission's attitude in this yellow card procedure is also

¹ Letter from the Senate of the States General of 17 October 2013, reference 153768.01u, addressed to the President of the European Commission, Parliamentary Papers I 2013–2014, 33 709, C.

² Communication from the Commission on the reconsideration of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with protocol no. 2, COM(2013)851.

³ Response from the European Commission regarding the subsidiarity objections raised by the Dutch Senate, dated 13 March 2014, Parliamentary Papers I 2013–2014, 33 709, G.

⁴ Letter from the I&A/JBZ and V&J standing committees of 24 April 2014, addressed to the Vice-President of the European Commission, Parliamentary Papers I 2013–2014, 33709 I. See discussions and documents in the Senate's electronic dossier on the proposal COM(2013)534 on www.europapoort.nl, under number E130041.

⁵ See, for example, the letter from the British House of Lords' European Union Committee dated 10 January 2014, the letter from the Chair of the British House of Commons' European Scrutiny Committee to the European Commission dated 7 May 2014 and the letter from the Croatian parliament's European Affairs Committee of 1 April 2014.

widely shared by the members of the Senate's I&A/ JBZ and V&J committees and even by the parliamentary groups who did not align themselves with the subsidiarity objections against the original Commission proposal.

The discussion of this dossier among members of the I&A/ JBZ and V&J committees has resulted in the following general comments concerning the yellow card procedure.

The subsidiarity principle is one of the most fundamental principles of the European Union. The principle aims to achieve an effective balance between what needs to be regulated at a European level and what can be adequately regulated by the member states. If they believe that the European Union is breaching the subsidiarity principle, national parliaments have the authority to draw attention to this breach by means of a reasoned opinion. The thresholds put in place to prevent the instigation of the yellow card procedure are so high that when an occasional instance of its use does occur, ultimately representing the voice of a large proportion of EU citizens, this cannot be allowed to happen without further consequences.

If this threshold is reached and the European Commission still insists on continuing to pursue the original proposal, from the perspective of democratic legitimacy, the Commission is then duty-bound to subject the objections raised by the national parliaments to rigorous analysis and provide precise reasons for its response to them. It is therefore unacceptable for the European Commission to make a judgement in November 2013 that the yellow card procedure based on the subsidiarity objections raised will not result in a reconsideration of the proposal and yet only in March 2014 address the details of the 'remaining' objections of the national parliaments, as was the case for the yellow card procedure concerning the proposal to establish a European Public Prosecutor's Office.

On behalf of the European Commission, Ms Reding has stated that the differences in the reasoned opinions put forward by the national parliaments were among the factors preventing it from proceeding to review the original proposal.⁶ This reasoning would appear to be at odds with the 'Practical arrangements for the operation of the subsidiarity control mechanism under protocol no. 2 of the Treaty of Lisbon', of 1 December 2009. In that, the Commission explains how it will approach the issue of determining whether the threshold for a yellow card procedure has been reached:

"The Commission has always favoured a political interpretation of opinions received from national Parliaments and will therefore consider all reasoned opinions raising objections as to the conformity of a legislative proposal with the principle of subsidiarity towards the thresholds indicated in the Treaty, even if the different reasoned opinions provide different motivations as to the non-compliance with the principle of subsidiarity or refer to different provisions of the proposal."

It would appear that the European Commission is adopting a generous interpretation when determining whether the threshold has been reached, according to which the differences in the objections suddenly present an obstacle to considering a possible review.

⁶ During the joint JBZ committee meeting 'Future Priorities in the field of Civil Liberties, Justice and Home Affairs' in Brussels on 19 March 2014.

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Without any further explanation, the European Commission indicates, by way of reassurance, that it will take proper account of the reasoned opinions of the national parliaments during the legislative procedure.⁷ From the perspective of democratic legitimacy, this kind of comment cannot be made lightly. As the yellow card procedure develops further, the Commission will need to justify this statement by continually providing additional accountability during the legislative process with regard to the way in which it is taking account of the objections expressed by the national parliaments and in what circumstances.

Finally, the committees would like to hear from the European Commission whether experiences with the two yellow cards justify a further clarification or tightening of the political arrangements from 2009. The committees would also like to refer, in this regard, to the recommendations of the L COSAC⁸ and the conclusions of the EU Conference of Speakers of 8 April 2014.⁹

The committees look forward to a response to the issues and questions raised in this letter.

Yours sincerely,

Ms. dr. G. ter Horst
Chair of the standing committee
for Immigration & Asylum /
Justice and Home Affairs Council

Ms. mr. dr. A.W. Duthler
Chair of the standing committee
for Security and Justice

⁷ See the Conclusions in the Communication from the Commission of 27 November 2013 and the letter from the European Commission to the Dutch Senate dated 13 March 2014.

⁸ In particular, points 4.4 and 4.5 of the L COSAC recommendations in Vilnius.

⁹ In particular, points 17 and 22 of the conclusions of the EU Conference of Speakers in Vilnius.