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Review article

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HOW INDEPENDENT IS THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE "DE FACTO"?

With the adoption of Regulation 2017/1939, the European Union created a legal framework for the creation of a European Public Prosecutor's Office that will prosecute criminal offences against the financial interests of the European Union. In a number of issues that arise in connection with the forthcoming operation of this new EU body, one of the most important is certainly the issue of its independence. The paper first presents some observations on the independence of the State Attorney's Office in national legal systems, and then analyses the independence of the EPPO itself. The position of the EPPO in relation to other EU bodies, and in particular in relation to the Member States, is particularly emphasised. In order to try to answer the question of the independence of the EPPO as a whole, it is necessary to consider interrelationships within the EPPO itself, and between the central (European) and national (European Delegated Prosecutor) levels.

Keywords: European Public Prosecutor's Office (EPPO), independence of prosecutors, European criminal law, protection of financial interests of the European Union

1. INTRODUCTION

Two decades on from the idea put forward in the Corpus Iuris,[1] regulations have been enacted to provide for the establishment of the EPPO, which should

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[1] "The idea of founding the EPP (European Public Prosecutor) was first proposed in 1996 by Klaus Hänsch, former President of the European Parliament ('Ten concrete proposals to step up the fight against fraud' presented by President Klaus Hänsch at the Interparliamentary Conference, Brussels 23 and 24 April 1996)". A. Csuri, "The Proposed European Public Prosecutor's Office: From a Trojan Horse to a White Elephant" (2016) 18 *Cambridge Yearbook of European Legal Studies*, p 129. The reason for setting up an EPPO can be seen in Recital 3 of the EPPO

begin its operations by the end of 2020. The start-up of this Office should certainly help strengthen the protection of the financial interests of the European Union compared to the present situation where prosecution for these offences is exclusively left to the prosecutors' offices of the Member States.[2] In a whole series of questions that arise regarding the establishment of the EPPO, one of the most important is the issue of the independence of the EPPO. The independence of the Office was a sticking point during the negotiations, since the status of prosecutors in domestic legal systems varies throughout the EU.[3]

The complex structure of the EPPO, consisting of the European and national levels (Delegated European Prosecutors), makes it difficult to assess independence, and for an accurate assessment it is necessary to note the relationship and powers between the central (European) and national level. In order to understand the underlying problems, which arise mostly from the differences in the national legal orders, we must first observe the position of the prosecution services in national legal systems.

2. GENERAL OBSERVATION ON THE POSITION OF PROSECUTION SERVICE IN NATIONAL LEGAL ORDERS

The position of prosecutors in criminal proceedings in much of the world has changed significantly in recent decades. Certainly, the most important

Regulation (EU) 2017/1939: "Both the Union and the Member States of the European Union have an obligation to protect the Union's financial interests against criminal offences, which generate significant financial damages every year. Yet, these offences are currently not always sufficiently investigated and prosecuted by the national criminal justice authorities". So, lack of interest or sufficient efforts on the part of Member States to prosecute those offences that do not directly affect their financial interests is the main reason. But it must be noted that the possible lack of interest on the part of states to prosecute such crimes is "short-sighted", since only a small percentage goes to the EU administration from the EU budget, while the largest part goes back to the Member States, either through structural and cohesion funds or through incentives. Therefore, crimes to the detriment of the EU's financial interests also indirectly damage Member States' budgets, albeit to a much lesser extent than acts that directly damage the national budget, such as national tax evasion. Regarding the reason for founding the EPPO, certain similarities with the founding of international criminal courts cannot be avoided. The reason for setting up international criminal courts is the bias of national courts when it comes to bringing to justice the perpetrators of offences deemed to have been committed in the national interest, which shows itself as a lack of interest for the prosecution of "its perpetrators" (and, of course, the excessive, unobjective interest for the prosecution of possible perpetrators of the "other side") .

[2] The concept of a European prosecution service, as proposed in the Corpus Juris study, aimed to tackle impediments to the prosecution of transnational fraud cases, namely substantive disparities in national criminal justice systems and the reluctance of Member States to initiate prosecutions. Csuri (n 1) p 150.

[3] V. Mitsilegas, F. Giuffrida, "Raising the Bar? Thoughts on the Establishment of the European Public Prosecutor's Office", CEPS Policy Insight No. 2017-39, 30 November 2017, p 7.

change is that prosecutors have received significantly greater powers in the criminal justice system, mostly those of a discretionary nature. This phenomenon is usually interpreted as a reaction to an increase in the caseload which, together with the restriction of budget resources for public prosecutors' offices and criminal justice, leads to an overload of the criminal justice systems. Jehle states that in principle there are three possible ways of dealing with the increased number of criminal proceedings: 1) increasing prosecution service and court personnel (Jehle justifiably considers this option, connected as it is with significant additional costs, as unrealistic); 2) decriminalisation of material law, where the threat of a criminal sanction is removed for less serious breaches of the law; and 3) discretion used by the police or the prosecution service and simplified rules of criminal procedure.[4] Today, the most widely used way to reduce the aforementioned overload is to reduce the number of cases that reach the trial stage by giving prosecutors greater discretionary powers to avoid prosecution or to end it at early stages of the proceedings.

This results in a significant expansion of the powers of the prosecutor, who increasingly and in a variety of ways end criminal cases.[5] At the same time, this partially implies the transfer of a significant part of the power from judges to prosecutors.

Of course, with these relatively newly acquired broader discretionary powers to avoid or end criminal prosecution, prosecutors always have the traditional power to decide to prosecute, without which, in accordance with the principle of accusation, there can be no criminal proceedings before a court. Weigend therefore calls the prosecutor a "judge by another name".[6]

Thus, it is no surprise that more and more researchers consider prosecutors as possibly the most influential subjects in the criminal justice system.[7] Therefore, with the rise of prosecutorial power, the question of the independence and accountability of prosecution is becoming increasingly important.

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[4] J.-M. Jehle, "The Function of Public Prosecution within the Criminal Justice System" in J.-M. Jehle and M. Wade (eds), *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Springer, 2006) pp 5-6.

[5] See J. Gutmann, S. Voigt, "The Independence of Prosecutors and Government Accountability", *ILE Working Paper Series*, No. 8, University of Hamburg, 2017, p 2.

[6] T. Weigend, "A Judge by Another Name? Comparative Perspectives on the Role of the Public Prosecutor" in E. Luna and M. Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford University Press, 2012) pp 377–391, as cited in S. Voigt, A.J. Wulf, "What Makes Prosecutors Independent? Analysing the Institutional Determinants of Prosecutorial Independence" (2017) 15(1) *Journal of Institutional Economics*, p 100.

[7] M. Tonry, "Prosecutors and Politics in Comparative Perspective" (2012) 14(1) *Crime and Justice*, pp 1-33. For prosecutors in the USA, Davis claims that "prosecutors are the most powerful officials in the American criminal justice system. A.J. Davis, "The Power and Discretion of the American Prosecutor" (2005) 49(1) *Droit et Cultures*, pp 55-66. Weigend (n 6) pp 383-389.

In some countries, the prosecutor is part of the judiciary in the broader sense while in other countries prosecutors may be part of the executive or may have the same status as lawyers.[8] The independence of prosecutors has two aspects: internal and external. The internal independence of a prosecutor refers to the internal relations within the prosecution service, i.e. the relation between prosecutors of lower rank and their superiors – in States with a hierarchical structure, it is possible for higher-ranked prosecutors from a higher prosecutor's office to deliver instructions to lower-ranked ones.[9] External independence means that no authority or person outside the prosecution service is authorised to give guidelines or instructions to a prosecutor on the handling of a specific case. In other words, in the exercise of their competences, the prosecutors are subject only to the Constitution and laws.[10]

2.1. Independence and accountability of prosecution

2.1.1. Independence

The issue of the independence of courts and judges is, at the normative level, much more highly regulated and much better researched in legal science, unlike the issue of the independence of prosecution services and prosecutors which has received much less attention.[11] The independence of courts and judges is understood in much of the modern democratic world as an indispensable element of the rule of law. But with the independence of public prosecutors, things are not so simple. The central issue here is certainly the independence of prosecution in relation to the other two branches of government.[12] Particularly dangerous are the efforts of the executive to misuse the work of the criminal justice system through the prosecution service. Weigend thus states that "the executive may exercise undue influence over prosecutors to protect government members, interest groups and supporting elites from criminal prosecution or, on the contrary, use its influence on prosecutors to repress citizens, businesses and political opposition if such behavior promises to enhance its own goals".[13]

[8] However, it must be underlined that being part of the judiciary does not always mean the same rules for both judges and prosecutors. European Network of Councils for the Judiciary (ENCJ), "Independence and Accountability of the Prosecution". ENCJ Report 2014-2016, pp 4-5.

[9] Ibid., p 52.

[10] Ibid, pp 52-53.

[11] See Voigt and Wulf (n 6) p 100.

[12] Ibid.

[13] Weigend (n 6) pp 383–9, as cited in Voigt and Wulf (n 6) p 100. Such behaviour of politicians and other influential figures is not limited to non-democratic regimes or developing

Gutmann and Voigt suggest prosecutorial independence "as a state in which prosecutors have no reason to expect that their lawful professional activities will result in negative consequences for themselves, such as being expelled, being transferred to another position or location, or being paid less".[14] They emphasise that prosecutorial independence, thus, refers to the relationship between prosecutors and the government, and is logically distinct from the presence or absence of corruption because prosecutors could be independent from governmental interference and still lack impartiality if they are willing to accept bribes or behave in other corrupt ways.[15]

It is important to emphasise that guarantees of the independence of prosecution written in legal documents do not always mean that this would indeed be achieved in practice. Therefore, it is interesting to mention the research of Van Aaken, Feld and Voigt in 2010,[16] where they attempted not only to measure the independence of prosecutors *de iure* and *de facto*, but also to establish if there is correlation between the two. They came to a rather unexpected conclusion – they found that these two kinds of independence are in most cases negatively correlated. In many countries where the independence of prosecution is *de iure* lower, they have *de facto* higher independence.[17] Trying to explain this correlation, the authors suggest the following explanation. Some international organisations require different reforms from countries that seek to join that organisation or obtain financial aid. One of the common requirements is a stronger fight against corruption and strengthening the independence of the judiciary. So, in an attempt to accede, countries which have serious problems with the independence of the judiciary are "forced" to adopt new legislation that provides *de iure* a very high level of judicial independence. So, as Van Aaken, Feld and Voigt suggest, the causality could be reversed, that is, that a high level of (perceived) corruption is the cause of legislative changes to strengthen the independence of prosecution. [18] But the authors emphasise that the *de facto* independence of prosecutors is not determined by well-intentioned declarations (i.e., fresh legislation), but by the actual behaviour of government representatives over a long period.[19]

countries. Iglesias has written on the pressures he and his fellow prosecutors experienced in the US. D.C. Iglesias, "A Prosecutor's Non-negotiables: Integrity and Independence (2010) 44(4) *Georgia Law Review*, pp 939-952.

[14] Gutmann and Voigt (n 5) p 3.

[15] Ibid.

[16] A. Van Aaken, L.P. Feld, and S. Voigt, "Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across 78 Countries" (2010) 12(1) *American Law and Economics Review*, pp 204–244.

[17] Ibid., p 224.

[18] Ibid.

[19] Ibid.

More elaborations of the relation between *de jure* and *de facto* prosecutorial independence are brought by Voigt and Wolf. They enquire more systematically into the determinants of the *de facto* independence of prosecutors.[20] The authors emphasise that the establishment of a high level of *de facto* judicial independence is a necessary, but not sufficient, condition for ensuring that justice prevails in criminal cases.[21] The reasons why the independence of prosecutors is also very important, perhaps even more important than the independence of judges, are numerous. One of the most important is that prosecutors can protect someone (close to the government) by deciding not to prosecute, without even starting criminal prosecution and a criminal procedure. By doing so, the suspect avoids not only criminal punishment, but also the negative publicity that comes with criminal proceedings at the trial stage if the suspect is well known to the general public. On the other hand, prosecutors can initiate investigation against someone (e.g. a political opponent of the current government) and cause great damage to the public image of that person even if the court refuses to confirm the indictment and start the trial due to an obvious lack of evidence. Voigt and Wulf discuss why a government would want to infringe the independence of prosecutors and why the protection of this independence is thus crucial to the rule of law. They state that from the viewpoint of a government, it may even be more attractive to erode the independence of prosecutors than to compromise the independence of the judiciary because the former may lead to less opposition and, hence, be less costly for the government.[22]

The executive can exercise influence on the judiciary and the prosecution agency for various reasons. Among these, according to Voigt and Wulf, one can broadly distinguish between two types of objectives: a) the government may want to end a legitimate criminal proceeding against one of its members or members of the supporting elites; and b) it may want to initiate an illegitimate criminal case to tarnish the reputation of some opponent, or even wrongfully convict that individual.[23] To fulfil these objectives, it has various methods at its disposal: incentives (such as bribes, salary increases, promotions, etc.) or disincentives (such as salary cuts, demotions, disciplinary transfers, forced retirement, etc.).[24] The potential costs of administering these methods to judges are always higher than administering them to prosecuting authorities because infringing judicial independence is a government action that is more visible and thus also more easily detectable than a comparable infringement

[20] Voigt and Wulf (n 6) pp 99–120.
[21] Ibid., p 104.
[22] Ibid.
[23] Ibid.
[24] Ibid.

aimed at the prosecution authority.[25] It is therefore also likely to lead to fiercer resistance. From a government's point of view, looking at some corrupt "cost-benefit" analysis, exercising an influence on the prosecution authority is likely to lead to comparable results at lower costs than using the same means against the judiciary. Thus, it is a more appealing option, because it can bring the same benefits at lower risk.[26]

2.1.2. Accountability

Freedom should always be accompanied by responsibility, so prosecutors must be accountable for their work, just like judges. The independence of both judges and prosecutors is not a right that can exist without such accountability.[27] How can accountability be defined? We could say that it entails making a body exercising power answerable to an external authority and with the possible consequence of sanctions.[28] Some authors state that accountability can be understood further as being linked to the rule of law in that the rule of law has a shared, open, and public character that in an objective way binds the exercise of power to determinate legal rules in as far as possible.[29] But accountability can also be interpreted in the sense that it goes further than the rule of law in implying a kind of answerability and subordination to an outside political authority, which leads to tension between the idea of political subordination implicit in the idea of accountability and the independence of prosecutors.[30] As Gutmann and Voigt warn, "prosecutorial independence is no panacea. Prosecutors might misuse their independence to prosecute crimes that have never been committed, or not prosecute crimes that have been committed".[31]

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[25] Ibid.

[26] Ibid.

[27] ENCJ Report (n 8) p 5.

[28] M. Bovens, "Analyzing and Assessing Accountability: A Conceptual Framework" (2007) 13(4) *European Law Journal*, pp 453-454; D. Curtin & A. Nollkaemper, "Conceptualizing Accountability in International and European Law" (2005) 26 *Netherlands Yearbook of International Law* p 4; R. Mulgan, "'Accountability': An Ever-Expanding Concept?" (2000) 78(3) *Public Administration*, p 555, all the above as cited in G. Conway, "Holding to Account a Possible European Public Prosecutor, Supranational Governance and Accountability Across Diverse Legal Traditions" (2013) 24 *Criminal Law Forum*, pp 374-375.

[29] B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) pp 114–126; B. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006), as cited in Conway (n 28) p 375.

[30] Conway (n 28) p 375.

[31] Gutmann and Voigt (n 5) p 8. The authors further state that prosecutors might do so to pursue their own political agenda. For example, prosecutors might choose the timing of their prosecutorial action strategically.

In national legal orders, the accountability of prosecution services depends on various factors. One of them is legal tradition. The basic differences are that in the common law tradition, the roles of the actors in the criminal justice system are more greatly separated, (i.e. the police have almost total autonomy from the prosecutor during investigation), while in the civil law tradition the "interaction of actors is much more blurred".[32, 33]

The EPPO will be accountable to the European Parliament, to the Council and to the Commission for its general activities and will issue annual reports.[34] This solution should be welcomed. The possible accountability of individual members of the EPPO, especially EDPs, will be considered in the following sections.

3. STRUCTURE OF THE EPPO AND ITS INDEPENDENCE

3.1. Structure of the EPPO

Over the last two decades, different models of organisation of the EPPO have been considered. White differentiates between: 1) reinforced horizontal cooperation under Art. 85 TFEU; 2) a decentralised service under Art. 85 TFEU; and 3) a vertical European public prosecutor's office under Art. 86 TFEU.[35] Ligeti and Simonato consider: 1) a college model; 2) a centralised model; and 3) an integrated model.[36]

[32] For a more detailed overview of the main differences of the accountability of the police and the prosecution in common law and civil law traditions, see Conway (n 28) pp 376-390.

[33] In some legal systems, the lack of control over prosecutorial discretion and its work in general is astonishing, as in the USA, where US attorneys have very broad discretion. C. Gomez-Jara Diez and E. Herlin-Karnell cite one US attorney: "The discretionary power to decide whether to prosecute is awesome", and conclude that this power is so formidable that, "if the United States Attorney abuses this power, the only available remedy is removal". C. Gomez-Jara Diez and E. Herlin-Karnell, "Prosecuting EU Financial Crimes: The European Public Prosecutor's Office in Comparison to the US Federal Regime" (2018) 19(5) *German Law Journal*, p 1214. Davis states that it is "unclear why the electorate, the judiciary, and legislature have taken such a 'hands-off' approach with the American prosecutor". She suggests that one reason could be the nature of prosecutorial responsibilities, because prosecutors enforce the law against people accused of committing crimes – a very unpopular group in a country that has an extremely punitive approach. The author comes to the possible conclusion that because law enforcement is such a high priority in the USA and since the victims of prosecutorial misconduct are so unpopular, the electorate, legislature, and judiciary may be less concerned with fairness in the prosecutorial process. Davis (n 7) p 464.

[34] Art. 6(2) of the EPPO Regulation.

[35] S. White, "Towards a Decentralized European Public Prosecutor's Office" (2013) 4 *New Journal of European Criminal Law*, pp 30-38.

[36] K. Ligeti, M. Simonato, "The European Public Prosecutor's Office: Towards a Truly European Prosecution Service" (2013) 4 *New Journal of European Criminal Law*, pp 7-21. The

Due to the different factors, especially the refusal of Member States to accept centralisation of the EPPO, Regulation 2017/1939 establishes the EPPO with an integrated, yet decentralised, structure consisting of two levels: a central (European) level and a national level. At the central level, we have the following members of the EPPO: the European Chief Prosecutor and 22 European Prosecutors (one per participating Member State) from among whom two deputies of the European Chief Prosecutor are chosen. At the national level, there are European Delegated Prosecutors (hereinafter: EDPs) who are considered members of the EPPO and who act at the national level.

Particularly interesting and complex is the fact that the EDPs are characterised by the so-called "double hat" status:[37] they will remain national prosecutors but at the same time they will be part of the EPPO.[38] The main advantage of this "double hat" approach is anchoring the European office into the national systems and thereby ensuring a certain proximity to the field work of investigations.[39]

When it comes to disadvantages, the "double hat" status raises concerns regarding the independence of EDPs and therefore of the EPPO in general. As

authors further explain that the "integrated model" is a development of the idea contained in the Corpus Juris, as it combines the need for hierarchy in the investigative phase with respect for the peculiarities of national legal orders as well as of national sovereignty. According to their interpretation, this model is "integrated" for two reasons. From a structural point of view, the integrated EPPO would consist of a "head" at the central level and "arms" in the form of delegated EPPs in the Member States. The central level and the delegated EPPs in the Member States would form a single body, i.e. the delegated EPPs would be an integral part of the European office. From the viewpoint of available resources, the integrated model would benefit from the existing resources both at national and EU level. Accordingly, the integrated EPPO would consist of a central EU prosecutor's office assisted by delegated prosecutors at national level who are integrated into the national criminal justice systems (p 15). During the process of negotiating and choosing the best possible internal structure of the EPPO, both non-legislative documents and professional circles favoured a hierarchical structure for the EPPO. L. Hamran, E. Szabova, "European Public Prosecutor's Office - Cui Bono" (2013) 4 *New Journal of European Criminal Law*, p 51.

[37] Authors who use this term include Ligeti and Simonato (n 36) p 15.

[38] The double hat approach has had many proponents from the very beginning of the idea itself, since the Corpus Iuris.

[39] Ligeti and Simonato (n 36) p 15. The authors state that this peculiar status of EDPs should ensure that the EPPO receives information about cases that are within its competence. Csuri explains that "the endless compromises required to keep the Member States in the EPPO project have shifted the focus of negotiations from how to create a European body with identical investigative powers to how to integrate the future European body into the different national legal systems. As a result, the latest drafts envisage a system where prosecutorial decisions are made in a complex college model". A. Csuri, "The Proposed European Public Prosecutor's Office: From a Trojan Horse to a White Elephant" (2016) 18 *Cambridge Yearbook of European Legal Studies*, p 150.

Ligeti and Simonato point out, "the double hat delegate is confronted with the dilemma of serving two masters simultaneously" and therefore the status of "double hat" EDPs needs to be carefully addressed.[40] Satzger also raises the question whether EDPs could really be "expected to independently serve two masters".[41] Mitsilegas and Giufrida wrote that this status "raises concerns about the actual independence they will enjoy when dealing with the crimes affecting the Union's financial interests".[42] We will elaborate on this problem in more detail below. It is not surprising that the most important issue, when it comes to securing independence but also securing responsibility, is the question of the manner of appointment and the possibility of dismissal and disciplinary proceedings of members of the EPPO.

3.1.1. Appointment and dismissal of the members of the EPPO

3.1.1.1. Appointment and dismissal of EPPO members at the central level

Provisions on the appointment of EPPO members are provided in Art. 14-17 of the EPPO Regulation. The European Chief Prosecutor is appointed by the European Parliament and the Council from a list of candidates chosen by the selection panel, for a non-renewable term of 7 years.[43] Regarding the accountability and possible dismissal of the European Chief Prosecutor, the Regulation puts the Court of Justice in charge of his/her dismissal, upon the application of the European Parliament, of the Council, or of the Commission. The Court of Justice may dismiss the European Chief Prosecutor if it finds that he/

[40] Ligeti and Simonato (n 36) p 16.

[41] H. Satzger, "The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could Be Avoided" in P. Asp (ed), *The European Public Prosecutor's Office – Legal and Criminal Policy Perspectives* (Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, 2015), as cited in V. Mitsilegas, F. Giuffrida, "Raising the Bar? Thoughts on the Establishment of the European Public Prosecutor's Office, CEPS Policy Insight No. 2017-39 / 30 November 2017, p 5.

[42] Mitsilegas and Giuffrida (n 41) p 19.

[43] Art 14 of Regulation 2017/1939. The European Chief Prosecutor shall be selected from among candidates: (a) who are active members of the public prosecution service or judiciary of the Member States, or active European Prosecutors; (b) whose independence is beyond doubt; (c) who possess the qualifications required for appointment to the highest prosecutorial or judicial offices in their respective Member States and have relevant practical experience of national legal systems, financial investigations and of international judicial cooperation in criminal matters, or have served as European Prosecutors, and (d) who have sufficient managerial experience and qualifications for the position.

she is no longer able to perform his/her duties, or that he/she is guilty of serious misconduct.[44]

The College of the EPPO consists of the European Chief Prosecutor and one European Prosecutor per Member State. The College appoints two European Prosecutors to serve as Deputy European Chief Prosecutors for a renewable term of 3 years, which must not exceed the periods for their mandates as European Prosecutors.[45] The Deputy European Chief Prosecutors retain their status as European Prosecutors.[46]

European prosecutors are appointed by the Council (acting by simple majority) for a non-renewable term of 6 years. Each Member State nominates three candidates for the position of European Prosecutor from among candidates: (a) who are active members of the public prosecution service or judiciary of the relevant Member State; (b) whose independence is beyond doubt; and (c) who possess the qualifications required for appointment to high prosecutorial or judicial office in their respective Member States, and who have relevant practical experience of national legal systems, of financial investigations and of international judicial cooperation in criminal matters. After having received the reasoned opinion of the selection panel referred to in Article 14(3) of Regulation, the Council selects and appoints one of the candidates to be the European Prosecutor of the Member State in question (Art. 16(1) and (2). Regarding the dismissal of European prosecutors, the same rules apply. The Court of Justice is also in charge of dismissal, upon an application of the European Parliament, of the Council, or of the Commission, if it finds that the prosecutor is no longer able to perform his/her duties or that he/she is guilty of serious misconduct (Art. 16(5)).

3.1.1.2. Appointment and dismissal of the European Delegated Prosecutors

European Delegated Prosecutors are appointed by the College upon a proposal by the European Chief Prosecutor. But the College can only appoint candidates who are nominated by the Member States. The EPPO Regulation sets some criteria for candidates. The European Delegated Prosecutors must,

[44] Art. 14(5) of the EPPO Regulation. Van Gerven suggests that a "fully independent EPP must be appointed at the highest judicial level of the Community and therefore at the level of the ECJ". W. Van Gerven, "Constitutional Conditions for a Public Prosecutor's Office at the European Level" (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice*, p 318.

[45] The selection process is regulated by the internal rules of procedure of the EPPO.

[46] Art. 15(1) of the EPPO Regulation.

from the time of their appointment as European Delegated Prosecutors until dismissal, be active members of the public prosecution service or judiciary of the respective Member States which nominated them. Their independence must be beyond doubt and they must possess the necessary qualifications and relevant practical experience of their national legal system. If the College believes that the candidate nominated by a Member State does not fulfil this criterion, it may reject that person (Art. 17(1) and (2)).

Regarding the accountability of EDPs, unlike the rules about the dismissal of the European Chief Prosecutor and European prosecutors, the College itself is in charge of the dismissal of EDPs if it finds that they no longer fulfil the mentioned criteria, are unable to perform their duties, or are guilty of serious misconduct.

A very important element in considering the independence of EDPs is the possibility of the EPPO and Member States dismissing or instituting disciplinary proceedings against an EDP for different reasons. Regarding this possibility, we must differentiate between the reasons for such action that relate to an EDP's responsibilities under the EPPO Regulation and those that do not. A Member State can dismiss or take disciplinary action against its EDP without the consent of the European Chief Prosecutor only in the latter case. Nevertheless, the respective Member State must inform the European Chief Prosecutor before taking such action. A Member State may not dismiss, or take disciplinary action against, its European Delegated Prosecutor for reasons connected with his/her responsibilities under the EPPO Regulation without the consent of the European Chief Prosecutor. If the European Chief Prosecutor does not consent, the Member State concerned may request the College to review the matter (Art. 17(4)).

3.1.2. Independence of the EPPO

The issue of EPPO independence is as significant as the independence of prosecutors in national legal systems. Since criminal offences under the jurisdiction of the EPPO may often involve perpetrators or suspects who are members of the ruling political elite (e.g. deputy ministers deciding on the allocation of European funds, etc.), the issue of prosecutor independence is even more significant. Differences in the position of prosecution services in national legal systems are inevitably reflected in the attitude towards the EPPO, namely the independence of the EPPO. While many neutral observers "fight" for the broader independence of the EPPO, it is interesting and illuminating to mention the case of the Netherlands, which initially refused to participate in this mechanism of enhanced cooperation precisely because of the independence of the Office, "a feature running counter to a fundamental principle of the Dutch

legal system, where the public prosecution service follows the (general, and sometimes specific) instructions of the Minister of Justice, who is in turn accountable to the national Parliament".[47]

In the following part, we make a distinction between the independence of the EPPO in relation to other EU bodies and in relation to Member States (external independence) and the independence of members of the EPPO in relation to each other (internal independence).

3.1.2.1. External independence

a) Independence from European Union institutions

The EPPO is established as a body of the Union, with legal personality.[48] According to Art. 6 of the EPPO Regulation, the members of the EPPO must be independent and must neither seek nor take instructions from any institution, body, office or agency of the Union in the performance of their duties under the Regulation. The institutions, bodies, offices and agencies of the Union must respect the independence of the EPPO and must not seek to influence it in the exercise of their tasks.

After this overview of legal norms, we can ask if there might be a successful way for someone from other EU bodies and institutions to influence the work of the EPPO in some case? In my opinion, such a scenario is not particularly likely. Considering the detailed procedures in which decisions are brought in the European Commission, in the Council, and especially in the European Parliament, the chances of some individual or a small group misusing its power to influence the decision process in specific cases are rather small. One of the potential ways that national Chief Prosecutors in national legal systems could be influenced is the situation where politicians (who are in most cases in charge of choosing the Chief Prosecutor in the national parlia-

[47] See M. Zwiers, *The European Public Prosecutor's Office. Analysis of a Multilevel Criminal Justice System* (Intersentia, 2011) pp 64–65; W. Geelhoed, "Embedding the European Public Prosecutor's Office in Jurisdictions with a Wide Scope of Prosecutorial Discretion: The Dutch Example" in C. Nowak (ed), *The European Public Prosecutor's Office and National Authorities* (Kluwer-CEDAM, 2016) pp 96-98, as cited by Mitsilegas and Giuffrida (n 41) p 7.

[48] Art. 3 of the Regulation. To guarantee the full autonomy and independence of the EPPO, it should be granted an autonomous budget, with revenue coming essentially from a contribution from the budget of the Union. The financial, budgetary and staff regime of the EPPO should follow the relevant Union standards applicable to bodies referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council (1), with due regard, however, to the fact that the competence of the EPPO to carry out criminal investigations and prosecutions at Union level is unique (Recital 111 of the Regulation).

ment) promise that they will support him/her in running for a second term in exchange for benefits (usually dismissing the prosecution of some members of that political party who are considered suspects or even defendants of criminal offences). But the term of the European Chief Prosecutor and European prosecutors are not renewable and therefore such a possibility does not exist.

b) Independence from Member States

The question of the independence of the EPPO in relation to Member States is more problematic. According to Art. 6 of the Regulation, the EPPO is independent of the Member States and the "Member States of the European Union … shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks". At a normative level, this looks satisfactory,[49] but we should ask if it could happen that some Member State tries to obstruct some prosecution led by the EPPO. One could argue that it is not very likely this could happen, because the Member States that do not want the EPPO to be responsible for crimes against the financial interests of the EU simply will not accept it, i.e. they will refuse to participate in this form of enhanced cooperation within the EU. But things are not that simple and static. For example, one government or one political option could accept this, but the political situation could very quickly change and a new political option that forms the government and the parliamentary majority could have a much less benevolent attitude towards the EPPO. On the other hand, an even more likely scenario is that some Member State generally supports the creation and function of the EPPO, but wants to stop one particular prosecution case, e.g. the criminal prosecution of a highly ranked member of the leading political party who is suspected of some criminal offence against the financial interests of the EU. For these reasons, it is necessary to ask if there are possibilities for Member States to undermine criminal investigation and prosecution led by the EPPO in such cases? I believe that such a possibility exists, but to fully comprehend the problem, first we must analyse the question of internal independence within the EPPO.

[49] Some authors are optimistic regarding the relation with the Member States, such as Tilovska-Kechedji who states that "the independence of such body will ensure that investigations and prosecutions will be dealt with and taken to national courts, without the influence and delay of national authorities". E. Tilovska-Kechedji, "European Public Prosecutor's Office: To Be or Not to Be" (2017) 81 *European Journal of Crime, Criminal Law and Criminal Justice*, p 82.

3.1.2.2. Internal (in)dependence within EPPO.

Most countries today have some form of hierarchy and subordination as the main feature of the internal organisation of the prosecution service.[50] The majority of Member States that are participating in the establishment of the EPPO as a form of enhanced cooperation are no exception.[51]

Inside the EPPO, relations between the central (European) and national level could be described as follows: the central level will supervise the investigations and prosecutions carried out at the national level. So, Permanent Chambers can give instructions to the handling European Delegated Prosecutor, where it is necessary for the efficient handling of the investigation or prosecution, in the interest of justice, or to ensure the coherent functioning of the EPPO (Art. 10(5) of the EPPO Regulation). In this case, the Permanent Chamber acts through the European Prosecutor who supervises the investigation or the prosecution. It is also very important to say that the mentioned Art. 10(5) of the EPPO Regulation regulates that these instructions must be "in compliance with applicable national law".

3.1.2.3. Possible problems with independence in relation to Member States – the status of EDPs

Art. 26(3) of the EPPO Regulation states that: "Where no investigation has been initiated by a European Delegated Prosecutor, the Permanent Chamber to which the case has been allocated shall, under the conditions set out in paragraph 1, instruct a European Delegated Prosecutor to initiate an investigation". But what if the EDP does not follow this instruction or otherwise does something that could be considered serious misconduct? How is the accountability of the EDP addressed? The Regulation mentions the disciplinary responsibility of EDPs: "The College should be responsible for disciplinary procedures concerning European Delegated Prosecutors acting under this Regulation. Since European Delegated Prosecutors remain active members of the public prosecution or the judiciary of the Member States, and may also exercise functions as national prosecutors, national disciplinary provisions may apply for reasons not connected with this Regulation. However, in such cases the European Chief Prosecutor should be informed of the dismissal or of any dis-

[50] For a summary of the study of prosecution in European countries, see the ENCJ Report (n 8) pp 50-51.

[51] As reasons for such a hierarchical internal structure of prosecution services, unlike the structure of the court system, a few basic arguments are usually stated, the most important of which is securing a uniform prosecution policy.

ciplinary action, given his responsibilities for the management of the EPPO and in order to protect its integrity and independence".[52] It is important also to mention that the College must adopt internal rules of procedure of the EPPO in accordance with Article 21 and must further stipulate the responsibilities for the performance of the functions of the members of the College and the staff of the EPPO.[53]

Regarding the independence of EDPs in relation to Member States, it is interesting to mention that Art. 17(2) of the Regulation leaves open the possibility not only for members of the public prosecution service but also members of the judiciary (judges) of the respective Member States to be nominated and appointed as EDPs. Taking into account the "double hat" status, to ensure the independence of European Delegated Prosecutors it would be more suitable for them to be judges rather than members of the national public prosecutors' office, because the independence of judges in most Member States is, not only at the normative level but also in reality, better protected than that of prosecutors. Therefore, the potential for national structures to influence or put pressure on an EDP who is a public prosecutor in his or her country is also much greater than the potential to influence an EDP who is a judge. But this solution is rather unpractical and probably unrealistic. It is hard to expect judges who do not have previous experience as prosecutors to perform well a prosecutorial function.

4. CONCLUSION

Justice and politics are not sisters.
As soon as politics enters the temple, justice immediately rushes out of it.[54]

The legal regulation of prosecutorial independence is a very sensitive and complex issue, even in national legal systems where great differences can be seen. The complexity is further compounded when it comes to the legal regulation of this matter by the EPPO, given the decentralised structure of the EPPO and the fact that European Delegated Prosecutors are also active members of national prosecutors' offices or judicial bodies.

Is the EPPO Regulation indeed, as Mitsilegas and Giufrida stated, "probably the boldest and most ambitious instrument of EU (criminal) law adopted

[52] Recital 46 of the EPPO Regulation.

[53] Art. 9(4) of the EPPO Regulation.

[54] Carrara, as cited in H. Olásolo, "The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-judicial or a Political Body? (2003) 3 *International Criminal Law Review*, p 150.

thus far"? [55] We could certainly say this would be true if the original proposal of the Commission of 2013 had been adopted.[56] But the resistance of Member States, national parliaments and governments was too strong, and the Commission's federal vision was replaced by enhanced cooperation involving 22 Member States, with the features of "the usual intergovernmental, collegiate model that characterizes a number of current EU judicial cooperation structures".[57]

The EPPO Regulation is undoubtedly a great contribution to the development of European criminal law, but, on the other hand, it is hard to share the conspicuous enthusiasm of some authors because the current model leaves some significant, relatively obvious, possibilities for the obstruction of the work of the EPPO, mainly through the influence (or, to put it more directly, pressure) of national governments on EDPs which is possible mainly due to their "double-hat" status.

Given the "double hat" status to ensure the independence of European Delegated Prosecutors in relation to its Member States, it would be more suitable for European Delegated Prosecutors to be judges rather than members of national public prosecutors' offices,[58] because the independence of judges in most Member States is, not only at the normative level but also in reality, better protected than that of prosecutors. Consequently, the potential for national structures to influence a European Delegated Prosecutor who is also a public prosecutor in his/her country is greater than the potential to influence an EDP who is a judge. But this solution, although better when it comes to the independence of EDPs, is not practical and it brings many problems. The lack of pro-

[55] Mitsilegas and Giufrida (n 41) p 19.

[56] Mitsilegas states that "the Commission produced a highly innovative vision of centralised prosecution at EU level, with echoes of federalism in its use of concepts such as the exclusive competence of the EPPO". V Mitsilegas, "The European Public Prosecutor's Office Facing National Legal Diversity" in Nowak (n 47) pp 11-33, as cited in Mitsilegas and Giufrida (n 41) p 19. Perillo points out that "since the beginning of this legislative *process,* the European Parliament had sensed that things were not on the right track. And today even less so". As evidence of this conclusion, he mentions the resolution adopted by an overwhelming majority on 29 April 2015 in the Strasbourg plenary which stated first that "the structure of the European Public Prosecutor should be *fully* independent of national governments and European institutions and protected from any influence or political pressure" (para. 7). The Resolution then pointed out that "the provisions governing the division of powers between the European Public Prosecutor and the national authorities should be *clearly defined in order to avoid any uncertainty*" (para. 12). E. Perillo, "EPPO, the European Public Prosecutor's Office: European Only in Name or also in Law" (2016) 1 *Revista Romana de Drept European*, pp 88-89.

[57] Mitsilegas and Giufrida (n 41) p 19.

[58] Art. 17(2) of the Regulation leaves open the possibility not only for members of the public prosecution service but also members of the judiciary of the respective Member States to be nominated and appointed.

secutorial competence and experience is one of the main problems of this "judge EDP" possibility.

Of course, in most cases where suspects of crimes against the financial interests of the EU are not connected with the respective national governments or powerful individuals connected with governmental structures, there will usually be no problem with the possible pressure on EDPs. But in cases where the suspects of crimes against the EU financial interests are persons that have political influence and are connected with highly positioned individuals from the government, the situation could be complicated. The ability of certain structures or powerful high-ranking individuals in the Member States to influence the work of the EPPO is primarily due to the "double-hat" status of the EDPs and the fact that they, as national prosecutors, are nevertheless part of the hierarchical system. We have mentioned that the EPPO regulation also recognises this problem in Art. 17. With respect to disciplinary responsibility and dismissal, the Regulation distinguishes between the "European" and "national" basis for the responsibility of the EDP, and accordingly allocates powers to bring proceedings against that same person. The question is what a powerful person in the national system can do to prevent the prosecution of a person (e.g. his/her high-ranking colleague in a ruling political party) for a crime against the EU's financial interests. For example, it could be the Minister of Justice who has various mechanisms of influence over prosecutors in his/her Member State. One way is to "have an informal, persuasive conversation" with that EDP, asking him/her to forget, neglect, or ruin work on that case. If that EDP does not obey the informal request, the corrupt minister should find another way to do stop this EDP. As already mentioned, Art. 17(4) of the Regulation provides that Member States may not dismiss, or take disciplinary action against, a European Delegated Prosecutor for reasons connected with his/her responsibilities under the Regulation without the consent of the European Chief Prosecutor. So, in this situation, the formal ground for disciplinary proceedings against this prosecutor in his/her country could relate to his/her work as a national prosecutor, concealing the fact that the real reason is his/her work as an EDP on a "European case". This can be done without the consent of European Chief Prosecutor.

So, it is time for us to try to answer Satzger's question: "Would the Delegated Prosecutor really act objectively and openly against his superior and also against colleagues within the internal structure? Can he really be independent if he wants to continue a career in the national justice system and needs positive evaluations insofar?"[59] I believe that in the situation where one prosecutor "has two masters", national and European, the influence of the former is much stronger, because the Member State and not the EU is the one that provides the

[59] Satzger (n 41) p 74.

job, the salary, and decides in many ways on his/her position and career in the long term. Although the EDP is formally and *de lege lata* independent and free of instructions from anyone in his/her Member State during work on "European cases", hidden pressures on the EDP who is a prosecutor in the national criminal justice system could be strong and very effective.[60] The possibilities of addressing this issue within European law are very limited for two reasons. It is quite clear that Member States are not ready to accept such a structure of the EPPO in which operating prosecutors (in this model, EDPs) would be totally independent of Member States. This structure would be the best solution to ensure the independence of EDPs from Member States, but it is clear that there are no realistic chances for this model to be adopted for political reasons. And within this existing model, not much can be done because the independence and accountability of EDPs in regard to Member States is primary a matter of national law and the position and independence of the national prosecutor's office. All this is regulated by national constitutions and laws and there are great differences between Member States in this regard. So, we could curb our enthusiasm when it comes to the *de facto* independence of European Delegated Prosecutors who are prosecutors in their Member State. The only thing that could be done within the existing regulatory framework is the following. If the EPPO College believes that an EDP has committed serious misconduct working on a European case as a consequence of pressure coming from his/her superiors in his/her Member State, the College can dismiss the EDP for serious misconduct pursuant to Art. 17(3) of the Regulation. In this situation, the role of the other two members of the Permanent Chamber that are working with the respective EDP on that case is crucial but could become troublesome, especially if they do not understand the language of the case.

Even with these described possible problems with the status of the EDPs, the establishment of the EPPO is great step forward in the development of European criminal law and protection of the financial interests of the EU.[61] But we must be aware that the fight for an independent EPPO is not fought only at the level of EU law, but also at level of Member States' internal law. This is so because the *de facto* independence of the EPPO largely depends on the *de facto* independence of EDPs.

[60] Apart from the mentioned possibility of disciplinary proceedings against the EDP for "domestic reasons", the EDP prosecutor could, for example, be threatened with transfer to another city or province, depending on the rules of the prosecutors' position and independence.

[61] Jean Monnet wrote in his memoirs: "Those who do not want to start anything because they are not sure that things will go exactly as they had planned are condemning themselves to remain immobile. Nobody can say today what will be the institutional framework of Europe tomorrow, because future changes that are triggered by today's changes are unpredictable", as cited in Perillo (n 56) p 95.

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Sažetak

KOLIKO JE URED EUROPSKOG JAVNOG TUŽITELJA „DE FACTO" NEOVISAN?

Pitanje neovisnosti Ureda europskog javnog tužitelja jedno je od najvažnijih pitanja koja se pojavljuju u vezi s predstojećim početkom rada tog novog tijela Europske unije. Kao što je to u pravilu slučaj, pitanja koja su i na nacionalnoj razini složena prenošenjem na razinu EU-a dodatno dobivaju na svojoj složenosti uslijed dodatnih problema koji proizlaze i iz odnosa nacionalnog prava i prava Europske unije. I dok neovisnost Ureda europskog javnog tužitelja nije (ili barem ne bi trebala biti) ugrožena od strane drugih tijela EU-a, kad je riječ o mogućem utjecaju država članica koje sudjeluju u ovom programu proširene suradnje na njegovu neovisnost, stvari su ponešto drukčije. „Slaba točka" pritom su europski delegirani tužitelji, odnosno njihov status „double hat", koji uz neke nedvojbene prednosti ima i svoje slabe strane. Položaj europskog delegiranog tužitelja slabiji je, a mogućnost pritisaka na njega veća je ako je riječ o europskom delegiranom tužitelju koji je u svojoj državi tužitelj (a ne sudac). Razlog tome jest činjenica da je neovisnost sudaca u gotovo svim nacionalnim pravnim sustavima u EU-u mnogo veća te da su mogući mehanizmi pritisaka predstavnika izvršne ili zakonodavne vlasti na tužitelje mnogo veći. Moguće vođenje stegovnih postupaka ili poduzimanja raznih drugih manje očitih mjera (npr. uskrate zasluženog napredovanja, premještaja bez suglasnosti u drugo, udaljeno mjesto rada i dr.) prema tužiteljima u nekim nacionalnim pravnim sustavima odražavaju se negativno i na neovisnost tih tužitelja kao europskih delegiranih tužitelja.

Ključne riječi: Ured europskog javnog tužitelja (UEJT), tužiteljska neovisnost, europsko kazneno pravo, zaštita financijskih interesa Europske unije