**How independent the European Public Prosecutor's** **Office reallly is?**

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1. INTRODUCTION

Two decades on from the idea put forward in Corpus Iuris[[2]](#footnote-2), regulations have been enacted to provide for the establishment of an EPPO, which should begin its operations on November 20, 2020. The start-up of this Office should certainly help strengthen the protection of the European Union's financial interests compared to the current situation where prosecution for these offenses is exclusively left to the prosecutor's offices of the Member States.[[3]](#footnote-3) In the 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.[[4]](#footnote-4)

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

1. 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, most important change is that prosecutors have received significantly greater powers in the criminal justice system. This phenomenon is usually interpreted as consequence of the increase of caseload which, together with the restriction of budget resources for public prosecutor's offices and criminal justice, leads to overloading of the criminal justice systems. One of the ways to reduce the aforementioned problem is to reduce the number of cases that reach to trial stage or go through all stages of the proceedings, resulting in a significant expansion of the prosecutor's powers, that is, the transfer of a significant part of the power from the judges to the prosecutors, who increasingly in various ways end criminal cases.[[5]](#footnote-5)

Of course, with these relatively newly acquired expanded discretionary powers of criminal prosecution, with or without conviction, 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 prosecutors “judge by another name”.[[6]](#footnote-6)

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

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

2.1. INDEPENDENCE AND ACCOUNTABILITY OF PROSECUTION

**a) Independence**

The issue of independence of courts and judges is, at a normative level, much more regulated and much better researched in legal science, unlike the issue of the independence of the prosecution and prosecutors which has received much less attention.[[11]](#footnote-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 the public prosecutor, things are not so simple. The central issue here is certainly the independence of the prosecution in relation to the other two branches of government.[[12]](#footnote-12) Particularly dangerous are the efforts of the executive to misuse the work of the criminal justice system through 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]](#footnote-13)

*Gutmann* and *Voigt* propose to think of 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]](#footnote-14) They emphasize 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]](#footnote-15)

It is important to emphasize that guaranties of independence of prosecution written in legal documents do not always mean that that would indeed be realized in practice. Therefore it is very interesting to mention research of *Van Aaken, Feld and Voigt* from 2010.,[[16]](#footnote-16) where they tried not only to measure independence of prosecutors *de iure* and *de facto*, but also to establish if there is correlation between the two. They came to rather unexpected conclusion – they found out that these two kinds of independence are in most cases negatively correlated. In many countries where independence of prosecution is *de iure* lower, they have *de facto* higher independence.[[17]](#footnote-17) Trying to explain this correlation, authors state that some development aid is conditional on improvement in governance scores, including corruption and that it thus appears very plausible that high levels of corruption are a cause for major reforms, including of criminal procedural law. So, the causality could, hence, be reversed - that is, that high level of (perceived) corruption is cause of legislative changes to strengthen independence of prosecution. [[18]](#footnote-18) But authors emphasize that factual independence of prosecutors is not determined by well-intentioned declarations (i.e., fresh legislation), but by the factual behavior of government representatives over a long period.[[19]](#footnote-19)

More elaborations of 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]](#footnote-20) The authors emphasize that the establishment of a high level of *de facto* judicial independence is a necessary, but not a sufficient condition for ensuring that justice prevails in criminal cases.[[21]](#footnote-21) Reasons why is independence of prosecutors also very important, perhaps even more important than independence of judges are numerous. 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 stated that from the viewpoint of a government, it may be even 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 may, hence, be less costly for government.[[22]](#footnote-22)

An executive can exercise influence on the judiciary and the prosecution agency for various reasons. Among these we can broadly distinguish between two types of objectives: a) a 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]](#footnote-23) To fulfill 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 retirements, etc.) [[24]](#footnote-24) 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 aimed at the prosecution authority. It is therefore also likely to lead to fiercer resistance. From a government’s point of view, since 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 it is thus an appealing option.[[25]](#footnote-25)

**b) Accountability**

As freedom should always be accompanied with responsibility, so prosecutors must be accountable, just like judges, because both for judges and prosecutors their independence is not a right that can exist without such accountability.[[26]](#footnote-26) How could 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.[[27]](#footnote-27) Some authors state that accountability can be understood further as 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 so far as possible.[[28]](#footnote-28) But accountability can also be interpreted 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 independence for prosecutors.[[29]](#footnote-29)

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."[[30]](#footnote-30)

In national legal orders accountability of prosecution services depends on various factors. One of them is legal tradition. The basic differences are that in common law tradition, roles of actors in criminal justice system are much more separated, (i.e. police have almost total autonomy from the prosecutor during investigation), while in civil law tradition the "interaction of actors are much more blurred".[[31]](#footnote-31) [[32]](#footnote-32)

The EPPO shall be accountable to the European Parliament, to the Council and to the Commission for its general activities and shall issue annual reports.[[33]](#footnote-33) This solution should be welcomed, and the possible accountability of individual EPPO member, especially EDPs, will be considered in the following sections.

# 3. Structure of EPPO and its independence

## 3.1. Structure of EPPO

During the last two decades, different models of organization of EPPO were considered. *White* had differentiated between 1) reinforced horizontal cooperation under article 85 TFEU, 2) a decentralized service under article 85 TFEU and 3) vertical European public prosecutor's office under article 86 TFEU.[[34]](#footnote-34) *Ligeti* and *Simonato* wrote about 1) college model, 2) centralized model and 3) integrated model.[[35]](#footnote-35)

Due to the different factors, especially refusal of Member states to accept centralization of EPPO, Regulation 2017/1939 establishes EPPO with integrated, yet decentralized structure consisting of two levels: central (European) and national. On central level, we have following members of EPPO: European Chief Prosecutor, and 22 European Prosecutors (one per participating Member State) among which two deputies of European Chief Prosecutor are chosen. On national level, we have only European Delegated Prosecutors (hereinafter: EDPs) which are considered as members of EPPO which act on national level.

Particularly interesting and complex is status of EDPs, which is characterized by so called "double hat" status:[[36]](#footnote-36) they will remain national prosecutors but at the same time they will be part of EPPO.[[37]](#footnote-37) 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.[[38]](#footnote-38)

When it comes to disadvantages, "double hat" status raises concerns regarding the independence of EDPs and therefore EPPO in general. As *Ligeti* and *Simonato* point out, "the double hat delegate is confronted with the dilemma of serving two masters simultaneously" and that therefore the status of "double hat" EDPs needs to be carefully addressed.[[39]](#footnote-39) Satzger also raises questions if EDPs could really be “expected to independently serve two masters”.[[40]](#footnote-40) Mitsilegas and Giufrida (2017) p. 19. also wrote that this status “raises concerns about the actual independence they will enjoy when dealing with the crimes affecting the Union’s financial interests”. We will elaborate this problem in more details in the following pages. It is not surprising that the most important issue, when it comes to securing independence but also responsibility, is the question of the manner of appointment and the possibility of dismissal and disciplinary proceedings of members of EPPO

### 3.1.1 Appointment and dismissal of the members of the EPPO

#### a) Appointment and dismissal of EPPO members on central level

European Chief Prosecutor is appointed by European Parliament and the Council from a list of candidates chosen by the selection panel, for a non-renewable term of 7 years.[[41]](#footnote-41) Regarding the possible dismissal of European Chief Prosecutor, Regulation puts the Court of Justice in charge of his 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/she is no longer able to perform his/her duties, or that he/she is guilty of serious misconduct (art. 14. par. 5.).[[42]](#footnote-42)

The College shall appoint two European Prosecutors to serve as Deputy European Chief Prosecutors for a renewable mandate period of 3 years, which shall not exceed the periods for their mandates as European Prosecutors.[[43]](#footnote-43) The Deputy European Chief Prosecutors shall retain their status as European Prosecutors. (art. 15. par. 1.).

European prosecutors are appointed by Council (acting by simple majority) for a non-renewable term of 6 years. Each Member State shall nominate 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 shall select and appoint one of the candidates to be the European Prosecutor of the Member State in question. (art. 16. par. 1 and 2.). Regarding the dismissal of European prosecutors, the same rules apply. The Court of Justice is also in charge for dismissal, upon application of the European Parliament, of the Council or of the Commission, if it finds that he/she is no longer able to perform his/her duties or that he/she is guilty of serious misconduct. (art. 16. p. 5.).

#### b) Appointment and dismissal of the European Delegated Prosecutors

European Delegated Prosecutors are appointed by College upon a proposal by the European Chief Prosecutor. But College can only appoint candidates who are nominated by the Member States. Regulation sets some criteria for candidates. The European Delegated Prosecutors must, 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 shall be beyond doubt and they shall possess the necessary qualifications and relevant practical experience of their national legal system. If the College believes that the candidate nominated by Member States does not fulfil this criterion, it may reject that person. (art. 17. p. 1-2.).

Unlike dismissal of European Chief prosecutor and European prosecutors, the College itself is in charge for dismissal, if it finds that he/she no longer fulfils the mentioned criteria, is unable to perform his/her duties, or is guilty of serious misconduct.

Here we come to the interesting part, important for consideration of independence of EDP – the possibility of Member states to dismiss or take disciplinary proceedings against EDP. Regarding this possibility, we must differentiate between the reasons for such action that are connected with EDP's responsibilities under this Regulation and those that are not. Member state can dismiss or take disciplinary action against its EDP without the consent of the European Chief Prosecutor only for the latter. Anyway, 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, a European Delegated Prosecutor for reasons connected with his/her responsibilities under this 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. p. 4).

### 3.1.2. Independence of EPPO

The issue of EPPO independence is as significant as that of prosecutors in national legal systems. Since criminal offenses under the jurisdiction of the EPPO may often involve perpetrators - 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 reflected inevitably in the attitude towards EPPO, namely independence of EPPO. While many neutral observers “fight” for larger independence of EPPO, it is interesting and illuminating to mention the case of Netherlands, who 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.”[[44]](#footnote-44)

In this chapter we will make distinction between independence of EPPO in relation to other EU bodies and in relation to Member states (external independence) and independence of members of EPPO in relation to each other (internal independence).

#### 1. External independence

##### a) Independence from European Union institutions

The EPPO is established as a body of the Union, with legal personality (art. 3. of Regulation).[[45]](#footnote-45) According to art. 6. of Regulation, the members of EPPO shall be independent and will neither seek nor take instructions from any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The institutions, bodies, offices and agencies of the Union shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks.

After this overview of legal norms, we can ask ourselves if there could an efficient way for someone from other EU bodies and institutions to influence the work of EPPO in some particular case. In my opinion, such scenario is not particularly likely. Considering regulated way on which decision are being brought in European Commission, Council and especially European Parliament, chances of some individual or small group to misuse its power to influence the decision process in concrete cases, we must conclude there is no danger. One of the possible ways that Chief Prosecutors in national legal systems could be influenced is the situation where politicians (who are in charge for choosing Chief prosecutor in parliament) promise to him that they will support him in his aspiration for second term in exchange for benefits (usually dismissal of prosecution) of some members of that political party who are considered suspects or even defendants for some criminal offences. But the mandate of European Chief Prosecutor and European prosecutors are not renewable and therefore such possibility does not exist.

##### b) Independence from Member States

The question of independence of EPPO in relation to member states is more problematic. According to art. 6. of Regulation, "EPPO is independent from member states and the Member States shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks". That sounds great,[[46]](#footnote-46) but we should ask ourselves if it could happen that a Member state tries to obstruct some prosecution led by EPPO. One could argue that it is not very likely it could happen, because the Member states that do not want EPPO to be responsible for crimes against financial interest of EU connected with that Member State simply will not accept it, i.e. the will refuse to participate to this form of enhanced cooperation. But things are not that simple and static. One government or one political option could accept it, but the political situation could very quickly be changed and new political option that forms government and parliamentary majority could have much less benevolent attitude to EPPO. On the other hand, even more likely scenario is that some Member state generally strongly supports creation and function of EPPO, but they want to stop one prosecution case, e.g. criminal prosecution of highly ranked member of leading political party, who is suspect for some criminal offence against financial interests of EU. For those reasons, it is necessary to ask ourselves are there possibilities for Member states to undermine criminal investigation and prosecution led by EPPO in such cases? I believe that such possibility exists, but to fully comprehend the problem, first we must analyze question of internal independence within EPPO.

**2. Internal (in)dependence within EPPO.**

Most countries today have some form of hierarchy and subordination, as main feature of internal organization of prosecution service.[[47]](#footnote-47) Majority of member states that are participating in the establishment of EPPO as form of enhanced cooperation, are no exception.[[48]](#footnote-48)

Inside EPPO, relation between central (European) and national level could be described as follows: central level will supervise the investigations and prosecutions carried out at the national level. So, Permanent Chambers can give instructions to the law 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. p. 5. of EPPO Regulation). In this case, permanent chamber is acting through the European Prosecutor who is supervising the investigation or the prosecution. It is also very important to say that mentioned art. 10. par. 5. States that these instructions must be “in compliance with applicable national law”.

Art. 12 (3) The supervising European Prosecutors may, in a specific case and in compliance with applicable national law and with the instructions given by the competent Permanent Chamber, give instructions to the handling European Delegated Prosecutor, whenever necessary for the efficient handling of the investigation or prosecution or in the interest of justice, or to ensure the coherent functioning of the EPPO.

**Possible problem with independence in relation to Member States - status of EDPs**

Art. 26. p. 3.: “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 EDP do not follows this instruction?

In recital 46 disciplinary responsibility of EDP is mentioned: “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 disciplinary action, given his responsibilities for the management of the EPPO and in order to protect its integrity and independence.”

Art. 9. P. 4. The College shall adopt internal rules of procedure of the EPPO in accordance with Article 21, and shall further stipulate the responsibilities for the performance of functions of the members of the College and the staff of the EPPO.

**EPPO totally independent and resilient to obstruction? Curb your enthusiasm please!**

*Justice and politics are not sisters.
As soon as politics enters the temple, justice immediately rushes out of it.*[[49]](#footnote-49)

The issue of the prosecutor's independence and responsibility is extremely important. Given the more and more increasing importance of prosecutors in recent decades, we will not make the mistake if we qualify prosecutorial independence as one of the most important issues in the criminal justice system, an issue crucial to ensuring the rule of law. The legal regulation of this matter is very sensitive and complex even in national legal systems, which show great differences between them. The complexity is further compounded when it comes to the legal regulation of this matter by EPPO, given the decentralized structure of the EPPO and the fact that European delegated prosecutors are also active members of national prosecutors' offices or judicial bodies.

Is EPPO Regulation indeed “probably the boldest and most ambitious instrument of EU (criminal) law adopted thus far”? [[50]](#footnote-50) We could certainly say that if the original proposal of Commission from 2013. had been adopted,[[51]](#footnote-51) but resistance of Member states, national parliaments and governments was to strong, and the Commission’s federal vision was replaced by an enhanced cooperation involving 20 member states, with the features of “the usual intergovernmental, collegiate model that characterizes a number of current EU judicial cooperation structures”.[[52]](#footnote-52)

I believe that the EPPO Regulation is great contribution to the development of European criminal law, but on the other it is hard to share conspicuous enthusiasm of some authors because the current model leaves some, more or less visible, significant possibilities for obstruction of work of EPPO, mainly through influence (or to put it more directly: pressure) of national governments towards EDPs which is possible mainly because of 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 better for delegated prosecutors to be judges rather than members of national public prosecutors' offices,[[53]](#footnote-53) because the independence of judges in most Member States is not only at normative level, but also in reality, better protected than that of the prosecutors. Consequently, the potential for national structures to influence a European Delegated Prosecutor who is also a public prosecutor in a country is bigger than the potential to influence an EDP judge.

Of course, in most cases, where suspects for crimes against financial interests of EU are not connected with respective national governments, or powerful individuals connected with governmental structures, there will be no problem. But in those cases where suspects for crimes against EU financial interests are the persons that have big political influence and are connected with high-positioned individuals from the government, 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 judicial practitioners, especially as prosecutors, are nevertheless part of the hierarchical system. The regulation also recognizes this problem in Art. 17. With respect to disciplinary responsibility and dismissal, the Regulation distinguishes between a "European" and a "national" basis for the responsibility of EDP, and accordingly allocates powers to bring proceedings against that same person. If a Member State decides to dismiss, or to take disciplinary action against, a national prosecutor who has been appointed a European Delegated Prosecutor for reasons not related to his / her responsibilities under this Regulation, it shall inform the European Chief Prosecutor before taking such action. A Member State may not dismiss, or take disciplinary action against, a European Delegated Prosecutor for reasons connected with his/her responsibilities under this 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.

The question is what a powerful person in the national system can do to prevent the prosecution of a person (e.g. his or her high-ranking colleague in ruling political party) for a crime against the EU's financial interests. Let's say it is the Minister of Justice who has various mechanisms of influence over prosecutors in his Member State. One way is to "have an informal conversation" with that EDT and "ask" to forget, neglect, or ruin work on the subject. If that EDT do not obey the request, the corrupt minister should find another way to do stop this EDP. As was already mentioned, the Regulation in Art. 17. p. 4. provides that Member States may not dismiss A Member State may not dismiss, or take disciplinary action against, a European Delegated Prosecutor for reasons connected with his / her responsibilities under this Regulation without the consent of the European Chief Prosecutor. So, in this situation formal ground for disciplinary proceedings against this prosecutor could be connected with his work as national prosecutor, hiding that the real reason is his work as EDP on “European case”. This can be done without consent of European Chief prosecutor.

In what ways can the EPPO attempt to influence the work of the prosecutor working on the case. The hallmark of almost every prosecutorial organization is hierarchical organization and subordination,

One form of control over the work of the EPPO (specifically, the overly active prosecutor who prosecutes and when he should not first arise within the EPPO itself: - his decision to prosecute

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 or 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?”[[54]](#footnote-54) 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 who gives him/her the job, the salary, and decides in many ways on his career in long terms. Although EDP is formally and de lege lata independent and free from instructions from anyone from Member states during his/her work on “European cases”, hidden pressures on EDP who is prosecutor in national criminal justice system could be strong and very, very efficient.[[55]](#footnote-55)

Even with these described possible problems with status of EDPs, establishment of EPPO is great step forward in the development of European criminal law and protection of financial interests of EU.[[56]](#footnote-56) But we must be aware that the fight for independent EPPO is not fought only on level of EU law, but also on level on Member states law; because the de facto independence of EPPO largely depends on the de facto independence of EDPs.

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2. "The idea of founding 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.). Cited in: Csuri, A. (2016) The Proposed European Public Prosecutor's Office - From a Trojan Horse to a White Elephant, 18 Cambridge Y.B. Eur. Legal Stud. p. 129. The reason for setting up an EPPO we can see in recital 3 of EPPO Regulation 1939/2017. „*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 offenses that do not directly affect its 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 agriculture. 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 EPPO, certain similarities with the founding of international criminal courts could not 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 offenses deemed to have been committed in the national interest, which shows itself as lack of interest for prosecution of „its perpetrators“ (and of course excessive, unobjective interest for prosecution of possible perpetrators of „other side“) . [↑](#footnote-ref-2)
3. 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, A. (2016) The Proposed European Public Prosecutor's Office - From a Trojan Horse to a White Elephant, 18 Cambridge Y.B. Eur. Legal Stud. p. 150. [↑](#footnote-ref-3)
4. Mitsilegas, V.; Giuffrida, F. (2017) 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. [↑](#footnote-ref-4)
5. So *Gutmann, J,; Voigt, S*. (2017): The Independence of Prosecutors and Government Accountability, ILE Working Paper Series, No. 8, University of Hamburg, p. 2. *Jehle* states that in principle there are three possible ways of dealing with the increased number of criminal proceedings: 1) increasing of prosecution service and court personnel (Jehle justifiably considers this option, which is connected with considerable additional costs, as unrealistic), 2) decriminalization 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 prosecution service and simplified criminal procedure rules. Jehle, J.-M. (2006), ‘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, Berlin and Heidelberg: Springer, p. 5-6. [↑](#footnote-ref-5)
6. Weigend, T. (2012), ‘A judge by another name? Comparative perspectives on the role of the public prosecutor’, in The Prosecutor in Transnational Perspective, Oxford: Oxford University Press, p.377–391., as cited in: Voigt, S.; Wulf, A. J. (2017): What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence, Journal of Institutional Economics, 15: 1, p. 100. [↑](#footnote-ref-6)
7. Tonry, M. (2012) Prosecutors and Politics in Comparative Perspective, Crime and Justice, Vol. 41, No. 1, pp. 1-33. For prosecutors in USA see Davis (2005) , who claims that “prosecutors are the most powerful officials in the American criminal justice system. Davis (2005), The Power and Discretion of the American prosecutor“, Droit et Cultures, 49 | 2005-1, p. 55-66. *Weigend, 2012: 383–9., as cited from: Voigt Wulf str 103.* [↑](#footnote-ref-7)
8. However, it must be underlined that being part of the Judiciary does not always imply the same rules for both judges and prosecutors. Independence and Accountability of the Prosecution ENCJ Report 2014-2016, European Network of Councils for the Judiciary., p. 4-5. [↑](#footnote-ref-8)
9. Ibid. p. 52. [↑](#footnote-ref-9)
10. Ibid. p. 52-53. [↑](#footnote-ref-10)
11. So Voigt, S.; Wulf, A. J. (2017): p. 100. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Weigend, 2012: p. 383–9., as cited in: Voigt, S.; Wulf, A. J. (2017): p. 100. Such behavior of politicians and other influential figures is not limited to non-democratic regimes or developing countries. See, e.g. Iglesias writing on pressures he and his fellow prosecutors experienced in United States of America. Iglesias, D. C. (2010). prosecutor's non-negotiables: Integrity and independence., Georgia Law Review, 44(4), p. 939-952. [↑](#footnote-ref-13)
14. Gutmann, J,; Voigt, S. (2017) p. 3. [↑](#footnote-ref-14)
15. Gutmann, J,; Voigt, S. (2017) , p. 3. [↑](#footnote-ref-15)
16. Van Aaken, A., Feld, L. P. and Voigt S. (2010), ‘Do independent prosecutors deter political corruption? An empirical evaluation across 78 countries’, American Law and Economics Review, 12(1): p. 204–244. [↑](#footnote-ref-16)
17. Ibid. p. 224. [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. Ibid. [↑](#footnote-ref-19)
20. Voigt, S.; Wulf, A. J. (2017): What makes prosecutors independent? Analysing the institutional determinants of prosecutorial independence, Journal of Institutional Economics, 15: 1, p. 99–120 [↑](#footnote-ref-20)
21. Voigt, S.; Wulf, A. J. (2017), p. 104. [↑](#footnote-ref-21)
22. Ibid. [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. Voigt, S.; Wulf, A. J. (2017): p. 104. [↑](#footnote-ref-24)
25. Voigt, S.; Wulf, A. J. (2017): p. 104. [↑](#footnote-ref-25)
26. Independence and Accountability of the Prosecution ENCJ Report 2014-2016, European Network of Councils for the Judiciary., p. 5. [↑](#footnote-ref-26)
27. M. Bovens, Analyzing and Assessing Accountability: A Conceptual Framework’, (2007) 13(4) European Law Journal, p. 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 above as cited in Conway, G. (2013) Holding to Account a Possible European Public Prosecutor, Supranational Governance and Accountability Across Diverse Legal Traditions, Criminal Law Forum 24: p. 374-375. [↑](#footnote-ref-27)
28. B. Tamanaha, B. On the Rule of Law: History, Politics, Theory (Cambridge: Cambridge University Press, (2004) 114–126; B. Tamanaha, Law as a Means to an End: Threat to the Rule of Law (Cambridge: Cambridge University Press, 2006), as cited in: Conway (2013) p. 375. [↑](#footnote-ref-28)
29. Conway (2013) p. 375. [↑](#footnote-ref-29)
30. Gutmann, J,; Voigt, S. (2017) p. 8. They 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. [↑](#footnote-ref-30)
31. Conway (2013) p. 385. For more detailed overview of main differences of the accountability of police and prosecution in common law and civil law traditions, see Conway (2013) p. 376-390. [↑](#footnote-ref-31)
32. In some legal systems, lack of control over prosecutorial discretion and their work in general is astonishing, like in USA, where US Attorneys have very broad discretion. Gomez-Jara Diez; C. and Herlin-Karnell cit 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."" Gomez-Jara Diez; C., Herlin-Karnell, E., Prosecuting EU Financial Crimes: The European Public Prosecutor's Office in Comparison to the US Federal Regime, 19 German L.J. 1191 (2018), 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." He suggests one reason could be the nature of prosecutorial responsibilities, because prosecutors enforce the law against people accused of committing crimes- very unpopular group in that country that has extremely punitive approach and comes to one possible conclusion that because law enforcement is such a high priority in USA and the victims of prosecutorial misconduct are so unpopular, the electorate, legislature, and judiciary may be less concerned with fairness in the prosecutorial process. Davis, A. J. (2001) The American prosecutor: Independence, power, and the threat of tyranny, Iowa Law Review, 86(2), p. 464. [↑](#footnote-ref-32)
33. Art. 6. p.2. of Regulation. [↑](#footnote-ref-33)
34. White, S. (2013) Towards a Decentralised European Public Prosecutor's Office, 4 New Journal of European Criminal Law, p. 30-38. [↑](#footnote-ref-34)
35. Ligeti; K.: Simonato, M. (2013) The European Public Prosecutor's Office: Towards a Truly European Prosecution Service, 4 New Journal of European Criminal Law, p. 7-21. Authors explain that „integrated model“ 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 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 prosecutors' office assisted by delegated prosecutors at national level who are integrated into the national criminal justice systems. Ligeti; K.: Simonato, M. (2013) , p. 15. During the process of negotiating and choosing the best possible internal structure of EPPO, both the non-legislative documents and professional circles favoured a hierarchical structure for the EPPO. Hamran; L.; Szabova, E. (2013) European Public Prosecutor's Office - Cui Bono, 4 New J. Eur. Crim. L. p. 51. [↑](#footnote-ref-35)
36. Authors who use this term, among the many, Ligeti and Simonato (2013), p. 15; Weyembergh and Brière (2016), p. 12. [↑](#footnote-ref-36)
37. The double hat approach had many proponents since the beginning of idea itself, since Corpus Iuris. [↑](#footnote-ref-37)
38. *Ligeti; K.: Simonato, M.* (2013) p. 15, which 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” Csuri, A. (2016) The Proposed European Public Prosecutor's Office - From a Trojan Horse to a White Elephant, 18 Cambridge Y.B. Eur. Legal Stud. p. 150. [↑](#footnote-ref-38)
39. Ligeti; K.: Simonato, M. (2013), p. 16. [↑](#footnote-ref-39)
40. Satzger, H. (2015), “The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could be Avoided”, p. 74, in P. Asp (ed.), The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives, Stockholm: Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, as cited in: Mitsilegas, V.; Giuffrida, F. (2017) 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. [↑](#footnote-ref-40)
41. 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. [↑](#footnote-ref-41)
42. Van Gerven suggested that “fully independent EPP must be appointed at the highest judicial level of the Community and therefore at the level of the ECJ.", Van Gerven W. (2000) Constitutional Conditions for a Public Prosecutor's Office at the European Level, 8 Eur. J. Crime Crim. L. & Crim Just. 296 (2000) P. 318. [↑](#footnote-ref-42)
43. The selection process shall be regulated by the internal rules of procedure of the EPPO. [↑](#footnote-ref-43)
44. See Zwiers, M. (2011), The European Public Prosecutor's Office. Analysis of a Multilevel Criminal Justice System, Cambridge – Antwerp – Portland: Intersentia, pp. 64–65; Geelhoed, W. (2016), “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, Milan: Wolters Kluwer-CEDAM, pp. 87-102. pp. 96-98., as cited by: Mitsilegas, V.; Giuffrida, F. (2017) 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. [↑](#footnote-ref-44)
45. 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 (Regulation, recital 111.). [↑](#footnote-ref-45)
46. Some authors are optimistic regarding the relation with member states, like 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." Tilovska-Kechedji E.(2017) European Public Prosecutor's Office: To Be or Not to Be, 2017 J. E.-Eur. Crim. L., p. 82. [↑](#footnote-ref-46)
47. For summary of study of prosecution in European countries, see: Independence and Accountability of the Prosecution ENCJ Report 2014-2016, European Network of Councils for the Judiciary., p. 50-51. [↑](#footnote-ref-47)
48. As reasons for such hierarchical internal structure of prosecution services, unlike structure of court system, few basic arguments are usually stated, most important of them is securing the uniform prosecution policy. [↑](#footnote-ref-48)
49. *Carrara*, u: Programma di Diritto Criminale, Parte speciale, Vol. VIII, Lucca, 3938–3939 (1870), as cited in: *Olásolo* (2003), The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?, International Criminal Law Review 3: p. 150. [↑](#footnote-ref-49)
50. Mitsliegas and Giufrida (2017) p. 19. [↑](#footnote-ref-50)
51. Mitsilegas stated 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.” Mitsilegas, V. (2016), “The European Public Prosecutor’s Office Facing National Legal Diversity”, in C. Nowak (ed.), The European Public Prosecutor’s Office and National Authorities, Milan: Wolters Kluwer-CEDAM, pp. 11-33., as cited in: Mitsliegas and Giufrida (2017) p. 19. *Perillo* pointed 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 an evidence to this conclusion, he mentiones the resolution adopted by an overwhelming majority on 29 April 2015in the Strasbourg plenary it 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). Perillo, E. (2016) EPPO, the European Public Prosecutor's Office: European Only in Name or Also in Law, 2016, Revista Romana de Drept European, 1/2016 p. 88.-89. [↑](#footnote-ref-51)
52. Mitsliegas and Giufrida (2017) p. 19. [↑](#footnote-ref-52)
53. Art. 17. P. 2. of Regulation leaves open possibility not only for members of the public prosecution service but also members of judiciary of the respective Member States to be nominated and appointed. [↑](#footnote-ref-53)
54. Satzger, H. (2015), “The Future European Public Prosecutor and the National Prosecution: Potential Conflicts and How They Could be Avoided”, p. 74, in P. Asp (ed.), The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives, Stockholm: Stiftelsen Skrifter utgivna av Juridiska fakulteten vid Stockholms universitet, as cited in: Mitsilegas, V.; Giuffrida, F. (2017) 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., dostupno na: …??? [↑](#footnote-ref-54)
55. Except for the mentioned possibility of disciplinary proceedings against him for „domestic reasons“, EDP prosecutors could e.g. be threatened to be transferred to another city of province… [↑](#footnote-ref-55)
56. 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 the future changes, which will be fostered* ***by*** *today's changes, are unpredictable", as cited in: Perillo, E. (2016) EPPO, the European Public Prosecutor's Office: European Only in Name or Also in Law, 2016, Revista Romana de Drept European, 1/2016 p. 95.* [↑](#footnote-ref-56)