

Independence of the European Public Prosecutor's Office in the context of the appointment procedures

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Abstract

The personal independence of the European Chief Prosecutor and European Prosecutors is a prerequisite of the independence of the European Public Prosecutor's Office. Based on the experience of the first appointment procedures and a combined examination of EU law, areas of vulnerability can be identified which could jeopardise their independence. The definition and doctrinal positioning of prosecutorial independence, such as its separation from autonomy and accountability, is not a simple task in case of a supranational prosecutorial body. However, there are international expert bodies that have drawn attention to the central importance of guarantees in the appointment procedures and transparency in ensuring prosecutorial independence, which also underpins public confidence in the process. Although there are institutional safeguards in the appointment procedures for the European Chief Prosecutor and the European Prosecutors, the shortcomings of the legislation have been exposed by the recent experiences. There is insufficient transparency in the selection of the members of the selection panel and in its functioning. In addition, the legislation does not categorically exclude the possibility that political considerations without a legal basis may be introduced into the appointment procedure. The EU regulation governing the functioning of the European Public Prosecutor's Office and the operating rules of the selection panel should also be amended to ensure full transparency of the criteria used to select the members of the selection panel and the assessment of the selection panel during selection and ranking of the prosecutors. In addition, the relevant EU regulation should be amended to make the decision-making process in the Council of the European Union more transparent and to stipulate that the Council of the European Union and the European Parliament may base their selection decisions only on the criteria set out in the applicable legislation and the opinion of the selection panel.

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Keywords

European prosecutor, prosecutorial independence, prosecutor, criminal cooperation, appointment procedure, European Chief Prosecutor, EPPO

Introduction

The protection of the financial interest of the European Union is a mutual interest for all the Member States of the European Union (hereinafter: EU or Union). The independence of the entities charged with prosecutorial responsibilities in the criminal justice systems is a key condition for the rule of law.¹ In the second section, the article will focus on the conceptual framework and the pan-European standards concerning prosecutorial independence.

Nowadays, an increasing number of scientific literature papers deals specifically with the integration of the European Public Prosecutor's Office (hereinafter: EPPO) into the criminal justice system of the Union and its impact on the procedural regimes of the Member States. However, only a relatively low number of these available studies focuses on the independence of the EPPO. This is particularly true when independence is approached from the context of appointments. The EPPO is independent from the national governments, the European Commission, and other European institutions.² As part of the criminal justice area of the Union, it represents only the European public interest.³ The present article addresses the procedures of selection and appointment of the European Chief Prosecutor (hereinafter: ECP) and those of the European Prosecutors i.e. the constituents of the supranational level⁴ of the EPPO. However, the appointment procedure is not clearly defined in the Council Regulation on implementing enhanced cooperation on the establishment of the EPPO⁵ (hereinafter: Regulation), this is considered the process from the time when the need for recruitment arises until the new ECP or European Prosecutor has taken up the position. The personal independence of the ECP and that of the European Prosecutors is a prerequisite and immanent constituent of the prosecutorial independence of the EPPO. The ECP and the European Prosecutors neither seek nor take instructions from any person external to the EPPO, any Member State or any institution, body, office or agency of the Union.⁶ In order to ensure the greatest possible degree of their personal independence, it is inevitable to provide certain safeguards in the appointment procedures, whereby the assessment, selection and finally the appointment of the applicants is taking place. The aim of this article is to present these extremely important safeguards of independence in the appointment procedures.

The respective legal framework, as well as the experience gained and challenges met by EPPO during the first process of appointments in its history show certain vulnerabilities in the safeguards

1. Council of Europe, European Commission for Democracy Through Law (Venice Commission), 'European Conference of Prosecutors, Palermo, 5-6 May 2022, Report from thematic session I - Prosecutorial independence, autonomy and accountability: different models, common challenges in protection of human rights by Simona Granata-Menghini' (CDL-PI(2022)033, Strasbourg, 30 September 2022, pp 2).

2. European Public Prosecutor's Office, '2021 Annual Report' (ISBN 978-92-76-08806-6).

3. 2021 Annual Report, pp 8.

4. EPPO's hybrid characteristics stem from its multi-layered structure composed of two levels: a central (or supranational) and a national level. The College on the top involves the 22 European Prosecutors.

5. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2017] OJ L 283.

6. Council Regulation (EU) 2017/1939, art 6.

of independent appointment procedures. These vulnerabilities and suggestions to strengthen the integrity of the appointment procedures will be elaborated in the third section, where an emphatic part will deal with the role of the selection panel, one of the key institutional guarantees of independence. The effectiveness of the criteria used to select the members of the selection panel integrated into the process is not obvious. A non-professionally selected or non-independent selection panel could have an indirect negative impact on the independence of the ECP and the European Prosecutors. Increasing the transparency of the selection panel's decisions and the evaluation criteria used to compile the shortlists will increase public confidence in the appointment procedure. This conclusion also applies to the transparency of decision-making in the Council in the selection of the ECP and the European Prosecutors. To ensure personal independence from a political point of view, it is necessary, among other things, to avoid *de facto* application of criteria without any legal basis in future appointment procedures by the co-legislator, the European Parliament. Therefore, according to our hypothesis, the amendment of the EPPO Regulation and the Council Implementing Decision defining the selection panel operative rules would also be necessary as it will be discussed in detail in the third section.

However, it is neither the object nor the ulterior motive to call into question the independence of the EPPO, but to put the spotlight on weaknesses and possible improvements. Although we will show some provisions where we see a place for intervention, our aim is not to give proposals for codification.

The scope of independence of the prosecutorial bodies and that of the EPPO

Independence, autonomy, accountability, impartiality and objectivity of the public prosecutors are the primary criteria to ensure effective law enforcement and conformity to the rule of law. Justifying their necessity will be out of our scope. Conceptual clarity is necessary as regards the relation between independence, autonomy and accountability as all of them may arise in connection with the prosecutorial bodies.

Independence, autonomy, accountability

Independence is a versatile and complex phenomenon, it is essential to distinguish it from autonomy and accountability, as these concepts are quite close in meaning. With regard to autonomy, we accept the view of *Martijn Groenleer*, who avoids using the terms 'autonomy' and 'independence' as interchangeable synonyms. We agree that the term 'independence' stresses the condition of being free, exempt from any influence; in (slight) contrast, the term 'autonomy' emphasizes the capacity to manage one's own affairs, the ability thereof.⁷ Imagine a province of a state that is autonomous i.e. it has an own parliament; nevertheless, it is dependent on the state which it is part of. Consequently, it is autonomous yet not independent. Autonomy is a capacity of self-governance, self-regulation or self-direction.⁸ Some authors point out the link between autonomy and independence in relation to the EPPO when they write about the fact that the independence of the body could not be guaranteed

7. Martijn Groenleer, 'The autonomy of European Union Agencies. A comparative study of institutional development' (ISBN 978-90-5972-346-7, doctoral thesis, 2009, pp 29-30).

8. Ellen Frankel Paul, Fred D. Miller Jr., Jeffrey Paul, 'Autonomy' (ISBN 978-0521534994, Cambridge University Press, 2003).

without the self-regulatory power granted to it by the EPPO Regulation and a certain degree of financial autonomy which is specified in the existence of a separate budget and an autonomous system of management.⁹ The concept of autonomy is far beyond the scope of our study, therefore it is not elaborated further on.

Independence should not be confused with accountability either. The correlation between the notion of accountability and independence has been examined in detail by several scholars.^{10,11} To understand the essential elements of accountability, we refer to the concept of 'control'. Taking over the reasoning of *Madalina Busuioc*, three phases of control can be distinguished: *ex ante*, ongoing and *ex post*. The latter covers accountability since accountability may be used as a synonym for *ex post* control.¹² However, other scholars do not restrict the concept of accountability exclusively to the *ex post* control. *Mark Bovens* considers accountability as a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.¹³ As Zilioli concludes, "it is clear that the aim of accountability is not to achieve a direct control on the independent governance bodies: the very reason for which independence has been given to these bodies excludes the possibility of direct control of the political power."¹⁴ To illustrate the distinction from independence, let us take an example by *Christy Ann Petit*. The author elaborates the concept of accountability with regard to the European Central Bank (hereinafter: ECB). She presents how the ECB defined acceptance of its accountability as a legal and political obligation of an independent central bank to justify and explain its decisions to the citizens and their elected representatives. From this concept of accountability, we find remarkable the thoughts referring to an obligation: to explain how the power is used and to justify the decisions to the respective entities.¹⁵ Accountability may apply in a specific manner to judicial and prosecutorial bodies, i.e. in the form of judicial review of certain decisions (legal accountability). There is also the accountability of the EPPO to other EU institutions, which is part of the issue of democratic/institutional accountability.¹⁶ This includes the obligation for the ECP to appear once a year before the European Parliament and the Council, and before national parliaments of the Member States at their request, to give account of the general activities of the EPPO.¹⁷ In the context of the ECB, which has just been mentioned as an example, some authors have explored the balancing between independence and accountability, namely how a supranational institution can be both independent and accountable. They see the solution in

9. Martínez Santos, Antonio, 'The Status of Independence of the European Public Prosecutor's Office and Its Guarantees.' (in: *The European Public Prosecutor's Office: The Challenges Ahead*, edited by Lorena Bachmaier Winter, 1–23. *Legal Studies in International, European and Comparative Criminal Law*. Cham: Springer International Publishing, 2018, pp 17-18).

10. Miroslava Scholten, 'Accountability vs. Independence: Proving the Negative Correlation' (*Maastricht Journal of European and Comparative Law*, Vol 21, Issue 1, 2014).

11. *Christy Ann Petit*. 'Balancing independence with accountability: A third-metre waltz?' (*Maastricht Journal of European and Comparative Law*, 2019, Vol. 26(1) 17–34, 2019, pp 22).

12. *Busuioc*, pp 12.

13. *Mark Bovens*, 'Analysing and Assessing Accountability: A Conceptual Framework' (*European Law Journal*, 13, issue 4, July 2007, pp 447-468).

14. Chiara Zilioli, 'Accountability and Independence: Irreconcilable Values or Complementary Instruments for Democracy? The Specific Case of the European Central Bank' (G. Vandersanden (ed), *Mélanges en hommage à Jean-Victor Louis*, Brussels, Université de Bruxelles, 2003, pp 395-422).

15. *Ann Petit*, pp 20.

16. Council Regulation (EU) 2017/1939, 16.

17. Council Regulation (EU) 2017/1939, art 7. 2.

transparency. As will be highlighted below, a lack of transparency in the selection of the ECP and the European Prosecutors can result in a serious democratic deficit.¹⁸ In the case of the EPPO, the legislator sees strict accountability, and in particular the accountability of the ECP – who, in relation of the performance of his or her duties as head of the EPPO, and in that status has a broad institutional accountability to the European Parliament, the Council and the Commission – as a complement to independence.¹⁹

Independence as a system of safeguards against undesirable external interference

The guarantee of independence is equivalent to the application of appropriate safeguards against various forms of interference. Independence may also be approached from the point of view of the interference and the safeguards ensuring protection against it. The EPPO's independence can be considered from various aspects, for instance from the point of view of safeguards. A study ordered by the European Parliament establishes four categories of guarantees against the potential impact threatening it.²⁰ According to the study, the independence of the EPPO as a shield against external interference may be evaluated from, among others legal, political or even physical security aspects.²¹ From the legal point of view, Article 6 of the Regulation²² creates grounds to prevent interference with the EPPO. It views the EPPO as “*an institution endowed with a clear European vocation, aimed at safeguarding genuinely European interests*”.²³ The authors of the study classify the appointment procedure under the political safeguards, which lead us to the conclusion that they probably see a potential risk when inadequate appointments may result backslide in independence.²⁴

A uniform minimum level for prosecutorial independence in Europe

It is necessary to examine whether there is an absolute benchmark for assessing the independence of prosecutors. Member States are different in their state structure (e.g. unitary or federal states), thus, their legal systems, legal cultures and the models of public prosecution will differ accordingly. The independence of the public prosecution in only one selected Member State may not suffice as an absolute reference point when establishing general criteria. The concept of independence applies

18. Deirdre Curtin, ‘Accountable Independence’ of the European Central Bank: Seeing the Logics of Transparency’ (European Law Journal, 2017, Vol. 23, No. 1-2, pp 28–44).

19. Council Regulation (EU) 2017/1939, 18.

20. European Parliament, Directorate-General for International Policies of the Union, Policy Department D for Budgetary Affairs, *The European Public Prosecutor’s Office: strategies for coping with complexity* (Study requested by the CONT Committee, PE 621.806, May 2019) 2.1.1.

21. Study requested by the CONT Committee, PE 621.806, May 2019, 2.2.2.

22. According to Article 6 “*The EPPO shall be independent. The European Chief Prosecutor, the Deputy European Chief Prosecutors, the European Prosecutors, the European Delegated Prosecutors, the Administrative Director, as well as the staff of the EPPO shall act in the interest of the Union as a whole, as defined by law, and neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this Regulation. The Member States of the European Union and 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*”.

23. Study requested by the CONT Committee, PE 621.806, May 2019 refers to the complex evolution of EPPO’s structure throughout the legislative process is examined in detail by, among others, Martínez Santos (2018).

24. Study requested by the CONT Committee, PE 621.806, May 2019, 2.2.2.

differently in the Member States due to their particular public prosecutorial models (continental or Anglo-Saxon). However, independence of the prosecutorial bodies serves as a prerequisite for the rule of law as mentioned in Opinion No. 16 of the Consultative Council of European Prosecutors²⁵ (hereinafter: CCPE Opinion No. 16).

An important point of reference could be the substantial, broadly recognised conclusions of the Venice Commission formulated in its report on European standards concerning the independence of the judicial system, especially that of the prosecution.²⁶ The Venice Commission points out that there is no common standard to provide for the independence of the prosecution systems. In addition, this standard substantially varies from country to country; yet there are features and values, which are common in all modern criminal justice systems. These are clear to identify e.g. the requirement of fair and impartial proceeding of the prosecutor or the expectation to act in a judicial manner.²⁷ The opinion of the Venice Commission allows for considering the issue of independence on widely accepted principles.

Firstly, according to the Venice Commission, it is “*important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore, professional, non-political expertise should be involved in the selection process*”.²⁸ The Venice Commission thus makes the acquisition of public confidence a criterion for assessing the appropriateness of the selection. We state that the lack of transparency in appointment procedures is liable to undermine public confidence. Although the appointment procedures of the EPPO at issue involve a professional body – a selection panel – the lack of transparency in the selection of the members of the selection panel may jeopardise the independence of the selection panel itself. This may have an indirect impact on the independence of the EPPO. This argumentation will be elaborated further below.

The Venice Commission considers it important to accept the principle of cooperation amongst state organs to avoid unilateral political nominations.²⁹ In the case of the EPPO, this requirement can be assessed in the context of cooperation between the EU institutions. During the first appointment procedures, a serious institutional conflict arose between the EU institutions involved, namely the Council and the European Parliament on the procedure of appointments and the person of candidates. This has not been helped by the lack of transparency of the procedure within the Council and the inclusion of the political aspects of the European Parliament in an appointment procedure for an essentially judicial post. This might also have an impact on public confidence by undermining the faith in prosecutorial independence, and should be addressed by amending the applicable legislation.

25. Council of Europe, Consultative Council of European Prosecutors, ‘CCPE Opinion No. 16 (2021): Implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors’ (CCPE(2021)6, Strasbourg, 26 November 2021).

26. European Commission for Democracy Through Law (Venice Commission), *Report on European Standards as regards the Independence of the Judicial System: Part II. - The Prosecution Service* (Adopted by the Venice Commission at its 85th plenary session, Study N° 494 / 2008, 3 January 2011).

27. Report on European Standards as regards the Independence of the Judicial System: Part II. - The Prosecution Service, Section 4.

28. Report on European Standards as regards the Independence of the Judicial System: Part II. - The Prosecution Service, point 34.

29. Report on European Standards as regards the Independence of the Judicial System: Part II. - The Prosecution Service, point 35.

Another important reference point of independence could be the aforementioned CCPE Opinion No. 16. This document aims to examine several aspects of the independence of the prosecutorial bodies and that of the individual prosecutors based on the case-law of international courts and decisions of treaty bodies. According to the CCPE Opinion No. 16, the recruitment of prosecutors should be similar to those of the judges, i.e. established and governed by transparent and objective criteria.³⁰ The CCPE specifically mentions the requirement of transparency in the selection process of prosecutors. The CCPE shares the views of the Venice Commission on the independent panel to be included in the selection. CCPE Opinion No. 16. emphasizes that guaranteeing the applications of prosecutors by an independent body is necessary, in particular for appointments etc.³¹ This criterion is reaffirmed by reference to the case-law of the European Court of Human Rights (hereinafter: ECtHR), which says that “*compliance with the requirement of an independent tribunal is assessed on the basis of statutory criteria, such as the manner of appointment of its members and the duration of their term of office...*”³²

Of course, both the Venice Commission and the CCPE have examined a number of additional aspects, such as among others the question of re-appointment and term in office, the issue of internal independence and the appropriate legal qualifications. Given that these go beyond our narrower scope of analysis, we will not deal with them here.

Ensuring prosecutorial independence through appointment procedures – experiences and challenges

In the appointment procedures of the ECP and the European Prosecutors, the guarantees to ensure their personal independence are part, from a systematic point of view, of prosecutorial independence. Personal independence is a *sine qua non* for the independence of EPPO as a whole. An independent EPPO needs independent prosecutors, and the independence of prosecutors derives from their public mandate, so if for whatever reason their status of ECP or European Prosecutor ceases to exist, their independence is no longer meaningful within the EPPO. In consequence, the EPPO cannot be considered independent in organisational terms if its prosecutors are not independent in personal terms. The functional independence of the EPPO – and within that, the functional independence of the prosecutors acting in relation to their tasks – must be subject of a separate examination. Functional independence does not yet become relevant in the appointment procedure, but only when the status of prosecutor has been granted and the activity has started. Functional independence is out of the scope of this study.

First, the notion of appointment procedure must be determined. Albeit the Regulation does not provide definition what is to be meant under the appointment procedure, it is considered a legally established procedure leading up to the acquisition of the legal status of the ECP and the European Prosecutors under public European law, it starts with the submission of application of the candidates or their nomination by the respective Member State consecutively, through their assessment and selection phase until the announcement of the appointed person.

30. CCPE Opinion No. 16, point 14.

31. CCPE Opinion No. 16, III. 68.

32. CCPE Opinion No. 16, B. 20.

Eligibility of the candidates for the position of ECP and European Prosecutors

The first step to ensure independence is the necessity to employ persons of high standing qualifications and experiences, suitable to be prosecutors. The qualities of a prosecutor are similar to those of a judge and require the appropriate procedure for appointment.³³ Following the recommendation of the Venice Commission on the appointment of the prosecutors, requirements in the Regulation for appropriate legal qualifications for the ECP and the European Prosecutors may be satisfactory. Suffice to note here that both the Venice Commission and the CCPE considers critical that the candidates possess appropriate legal qualifications that is not assessed in this publication. One of the eligibility conditions of the ECP and the European Prosecutors is independence. In addition, the candidate has to be an active member of the public prosecution service or judiciary of the Member State, or (only in the case of candidate for the position of the ECP) active European Prosecutor. Possessing the qualifications for the appointment to the highest prosecutorial or judicial offices in their respective Member State is a must. Relevant practical experience of national legal systems, financial investigations and international judicial cooperation in criminal matters are also required.³⁴ When considering candidates for the position of the ECP, factors such as prior experience as European Prosecutors or adequate managerial qualifications and experience are considered. Some of the eligibility criteria are objective, such as the linkage to the conditions of qualifications required for appointment to the highest prosecutorial or judicial offices in their Member States. It is a common practice in the EU regarding positions for which independence is crucial, e.g. judges of the Court of Justice of the European Union (hereinafter: CJEU) or the European Ombudsman.^{35,36}

Key role of the selection panel and the lack of its transparency

According to the rules of procedure, the selection of the ECP is based on an open call for candidates.³⁷ Once the deadline expires, the secretariat operated by the European Commission forwards the applications to the members of the selection panel. The selection panel appraises the applications and the enclosed documents; it shall exclude those who do not fulfil the criteria, and rank the remaining applicants based on the same criteria, expertise and qualifications. Even though the Regulation explicitly cites certain standards, the selection panel has to appraise the applications having regard to the relevant rules (Article 14) of the Regulation; the panel's task is highly responsible. Decisions of the selection panel shall be taken by consensus, however, if a member asks for a vote, the decision shall be taken by a simple majority of the members present. This means that in certain cases, simple majority of the members present is also sufficient for validity. As meetings of the selection panel shall be only valid if at least nine members are present, it follows that in case of a vote, five panel members' support is enough for a valid decision.³⁸ The selection panel organises personal interviews to a certain number of applicants in order to draw up a shortlist of three to five

33. Report on European Standards as regards the Independence of the Judicial System: Part II. - The Prosecution Service, point 17.

34. Council Regulation (EU) 2017/1939, art 14 (for the ECP) and art 16 (for the European Prosecutors).

35. TFEU, art 253.

36. 94/262/ECSC, EC, Euratom: Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties [1994] OJ L 113, art 6.

37. Council Regulation (EU) 2017/1939, art 14. 3.

38. Council Implementing Decision (EU) 2018/1696, IV.

candidates to submit to the European Parliament and the Council. The selected applicants are shortlisted indicating the selection panel's order of preference.³⁹ This rank is not binding on the European Parliament and the Council; they may choose even the last applicant on the submitted shortlist. Nevertheless, the influence of the selection panel is clearly visible, as the European Parliament and the Council may elect only from those applicants who have been shortlisted. Moreover, deliberations of the panel are confidential, take place *in camera* i.e., the public cannot be aware of the voting rates or the arguments behind the concerns of the opposed panel members.⁴⁰ The meetings, decisions and the reasoning thereof within the selection panel are not adequately accessible to establish public confidence. To counterbalance this competence, the selection panel has the obligation to state reasons. It is required to deliver the reasons for the respective applicants' shortlisting.⁴¹ Should a candidate be refused or excluded from the process, he/she has the right to be informed on those reasons and he/she may submit a complaint under the Staff Regulation to the Council. The Secretary-General of the Council, on behalf and under the responsibility of the Council, will exercise the respective powers conferred by the Staff Regulations on the appointing authority.⁴² The refused applicants may respond to the selection panel with their arguments and the panel has to reassess the application and send a written decision thereon.^{43,44} Although the ranking of the selection panel is not binding, it influences and can even fundamentally determine the decision-making in the Council. While the European Parliament hears the candidates and can thus gain an impression of the candidate's professional competence, ask questions, etc., the Council – partly due to a lack of resources – has to limit itself entirely to the assessment of the selection panel, and is in a way dependent on it. This is also true concerning the members of the selection panel, who are appointed by the Council on the proposal from the European Commission. All these circumstances reinforce the necessity for the composition of the selection panel (i.e. the selection process of the selection panel members themselves), its functioning and the criteria for its evaluations to be fully transparent to the public.

Contrary to the open recruitment of the ECP, the European Prosecutors are nominated directly by the Member States upon the result of a national selection procedure.⁴⁵ The pre-selection of the European Prosecutors is also assigned to the selection panel. Each Member State has to nominate three candidates for the position of European Prosecutor. The process is similar with the ECP; the selection panel delivers its reasoned opinion on the candidates and their eligibility for the criteria laid down in the Regulation. The panel will shortlist the candidates upon their qualification and experience. Nevertheless, the opinion of the selection panel is binding on the Council if the panel finds the candidate ineligible. The Council has to appoint one European Prosecutor from the three shortlisted candidates.⁴⁶ Here, it is sufficient if the Member State appoints only two candidates, and

39. Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [2018] OJ L 282, VI. 1.

40. Council Implementing Decision (EU) 2018/1696, IV.

41. Council Implementing Decision (EU) 2018/1696, IV.-VII.

42. Council Decision (EU) 2019/844 of 14 May 2019 on the exercise of powers by the Secretary-General of the Council as regards complaints submitted to the Council by candidates for the position of European Chief Prosecutor, OJ L 138.

43. "...candidates who are excluded from the selection procedure for the appointment of the European Chief Prosecutor may submit a complaint within the meaning of Article 90(2) of the Staff Regulations to the Council".

44. Council Decision (EU) 2019/844, (1).

45. Council Regulation (EU) 2017/1939, art 16.

46. Council Implementing Decision (EU) 2018/1696, VII. 2.

the selection panel will submit to the Council its reasoned opinion only on these eligible candidates.⁴⁷ Upon receipt of these nominations, the selection panel shall review them with regard to the requirements set out in the Regulation and shall organise personal hearings. The selection panel has to prepare a shortlist on the candidates that is not binding on the Council. In addition, they perform a “simple” conformity clearance and if they find that the candidates do not fulfil the required conditions, they will issue a reasoned opinion which will be binding on the Council.⁴⁸ After having received the order of preference from the selection panel, the Council has to appoint one candidate from the eligible nominees.⁴⁹

The Council has been authorised to adopt the detailed operational rules of this selection panel. The Decision (EU) 2018/1696⁵⁰ reiterates that a crucial element of the appointment procedure is to ensure the independence of the ECP and the European Prosecutors, and thus the operational rules have to ensure the independence and the impartiality of the panel.⁵¹ Both the Regulation and the adopted Decision (EU) 2018/1696 provides for the composition of the selection panel. It is composed of 12 persons appointed for a period of four years, who, at the time of their appointment are former members of the CJEU and the Court of Auditors, former national members of Eurojust, members of national supreme courts, high-level prosecutors or lawyers of recognised competence. The selection panel is mainly composed of distinguished legal professionals. None of these texts clarifies further aspects regarding the selection criteria, except that one from the 12 members has to be proposed by the European Parliament.⁵² The names of the other 11 persons appeared in the proposal of the European Commission.⁵³ Then, upon the proposal of the European Commission, the Council had to appoint the members for a period of four years.⁵⁴

It is to be noted that the initial proposal of the European Commission designated the European Commission as responsible to draw up and shortlist the candidates; then it would have submitted it to the Council, and it would have had to seek only the opinion of the selection panel.⁵⁵ The present Regulation offers much greater guarantee of independence, but in the present regulatory environment, the designation of the members and actions of the selection panel are not sufficiently transparent.

The European Commission’s proposal on 31 July 2018 on the appointing members of the panel (hereinafter: Proposal COM (2018)563) was the first document mentioning names for panel members.⁵⁶ In the Proposal COM (2018)563, the European Commission determined the selection criterion, reaffirming the provisions of the Regulation. Further details were also indicated, i.e. the

47. Council Implementing Decision (EU) 2020/1008 of 9 July 2020 amending Implementing Decision (EU) 2018/1696 on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 [2020] OJ L 221I, (7).

48. Council Implementing Decision (EU) 2018/1696, Annex VI. 2.

49. Council Implementing Decision (EU) 2018/1696, Annex VI. 2.

50. Council Implementing Decision (EU) 2018/1696.

51. Council Implementing Decision (EU) 2018/1696, (4).

52. European Parliament decision of 31 May 2018 on the appointment of Antonio Mura to the selection panel set up under Article 14(3) of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (“the EPPO”) (2018/2071(INSt)) [2018] OJ C 76.

53. European Commission, Proposal for a Council Implementing Decision appointing the members of the panel provided for in Article 14(3) of Regulation (EU) 2017/1939 (COM/2018/563 final, Brussels, 31 July 2018).

54. Council Implementing Decision (EU) 2018/1696, II.

55. European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office (COM(2013) 534 final, Brussels, 17 July 2013), art 8. 3.

56. COM/2018/563 final.

European Commission had taken into account the need to ensure balance in terms of geographical distribution, gender and knowledge of legal systems of the Member States participating in the EPPO.⁵⁷ However, it is not yet clear how the European Commission has selected the members of the panel, who were the persons in the group of candidates from which the European Commission selected the first members and how the vague qualitative selection criteria were applied. The Council adopted its decision on 18 September 2018 appointing the members of the selection panel established on the European Commission's proposal.⁵⁸ The lack of transparency of the criteria and method of selection of the members of selection panel itself give rise of concerns.

By the modification of point II of Decision (EU) 2018/1696, it would be necessary to impose a detailed obligation of justification on the European Commission in relation to the persons nominated as members of the selection panel. This obligation of justification should cover the fact that, with the exception of the member who can be appointed by the European Parliament, the relevant criteria were examined individually and thoroughly during the nomination process, and their results in relation to the candidates, considering their individual qualities. For each candidate, it should be demonstrated that the candidate under examination meets the criteria set out in Decision (EU) 2018/1696 and that he/she is able to evaluate and rank applications for the position of ECP and candidates for the position of European Prosecutor independently, impartially and objectively. This would therefore create a kind of increased transparency in the selection of the members of the selection panel. This is currently lacking, so it is not possible to trace whether the European Commission has in fact complied with the criteria set out in Decision (EU) 2018/1696 when it made its proposal to the Council. Similarly, the transparency of decision-making in the selection panel should be improved. By amending point IV of Decision (EU) 2018/1696 accordingly, the selection panel should be required to disclose, at least ex-post, the criteria used to rank and exclude candidates and whether their assessment criteria fully exhausted the relevant EU legislation.

The Council's role in the appointment of the ECP

The selection panel announced three names as shortlisted candidates in February 2019. The selection panel established a rank within the three shortlisted candidates and submitted it to the Council. As noted earlier, the ranking was not binding to the Council. The voting procedure in the Council was a secret and indicative ballot, and almost all the details of the voting procedure, arguments of the national delegations, meeting and the voting rates remained confidential. Later in February, the European Parliament organised the hearing of the three shortlisted candidates. A secret ballot voting followed the hearing. As a result, the Romanian candidate received the largest number of votes in both parliamentary committees.⁵⁹ It was a strange political situation expected by a very few: the Council and the European Parliament supported different persons. On 7 March, negotiations started with the Council in order to reach an agreement.⁶⁰ Criticism towards the Council's procedure appeared in the argumentation of the European Parliament's negotiators, who referred to

57. COM/2018/563 final, pp 4.

58. Council Decision (EU) 2018/1275 of 18 September 2018 appointing the members of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 [2018] OJ L 238.

59. Ana Maria Luca, 'European Parliament Committees Back Kovesi for Prosecutor's Post' (BalkanInsight, Bucharest, 27 February 2019), <<https://balkaninsight.com/2019/02/27/european-parliament-committees-back-kovesi-for-prosecutors-post/>> accessed on 27 December 2020.

60. European Parliament, LIBE Committee Newsletter n. 37 (11 March 2019), <<https://www.europarl.europa.eu/cmsdata/161662/libe-2019-march.pdf>> accessed on 22 December 2020, p 4.

the European Parliament's procedure as being fully public and transparent; meanwhile the Council did not have a clear position. Some argued that each institution decides for itself whether to conduct a hearing or not.⁶¹ At the same time, the criticism made by the European Parliament echo the point that the Council itself cannot carry out a professional assessment of the candidate due to the lack of its own assessment capacities/resources and therefore it does not hold hearings in order to assess the candidates itself, but relies solely on the assessment of the selection panel. From the perspective of this specificity, the suspicion of a politically motivated assessment in the procedure is increased if the Council changes the order determined by the selection panel without justification. In view of the potential sensitive nature of the decision-making power,⁶² for the sake of prosecutorial independence from the interference of the much more political co-legislator (the European Parliament), it would be important to preserve the role of the Council in the appointment procedure, but it is worth considering adding to Article 14 of the EPPO Regulation a safeguard provision requiring the Council to provide reasons in the appointment procedures. By making public the result of the vote, the explanatory statement and the dissenting opinions of the minority of Member States, an appropriate level of transparency could be achieved. This could, among other things, address criticisms that the professional criteria for independent selection in Council decision-making are subordinated to political bargaining. It would also prevent institutional conflicts which, in addition to public confidence in the EPPO's independence, seriously damage the reputation of the functioning of the Union as a whole.

The European Parliament's role in the appointment of the ECP

As the European Parliament stood with the Romanian candidate, the European Parliament's negotiation team called the Council to reconsider its position about their preferred French candidate. They argued that, unlike the Council, the European Parliament had held hearings for all three shortlisted candidates. They argued that they could not accept the fact that the Council had yielded to the pressure of the Romanian government to support a much weaker candidate. At that time, Romania hold the presidency of the Council. Regarding the Romanian candidate, the European Parliament had two different arguments: 1) it solicited the Council to respect the principle of gender balance; 2) Romania did not hold a single EU key post.⁶³

Finland took over the presidency in the Council as of July 2019. In September 2019, in the Council meeting, it proposed the question of the ECP to vote again; this time a majority endorsed by the Romanian candidate.⁶⁴ After a long and cumbersome procedure and certain delay, the European Parliament and the Council finally reached an agreement on the appointment of Ms Laura Codruța

61. Dan Alexe, 'MEPs push to give EU prosecutor job to Kövesi on 27 March' (Euractiv.com, 22 March 2019), <<https://www.euractiv.com/section/justice-home-affairs/news/meps-push-for-landing-eu-prosecutor-job-to-kovesi-on-27-march/>> accessed on 18 December 2020.

62. Council Regulation (EU) 2017/1939, 41.

63. European Parliament, Press statement, 4 April 2019, <<https://www.europarl.europa.eu/news/en/press-room/20190404IPR35112/ep-reiterates-its-support-to-laura-codruta-kovesi-to-become-eu-chief-prosecutor>> accessed on 20 December 2020.

64. Unknown author, 'COREPER Council votes Romanian Kovesi for top EU prosecutor' (actmedia.eu, 20 September, 2019) <<https://actmedia.eu/daily/coreper-council-votes-romanian-kovesi-for-top-eu-prosecutor/82774>> accessed on 22 December 2020.

Kövesi as the ECP. Therefore, the Council could formally approve the ECP on 14 October and the EP on 17 October 2019.⁶⁵

The selection criterion does not contain specifics concerning gender balance and distribution ratio of EU key positions as it was in the expectations of the European Parliament in the appointment procedure. Stirring political indicators into the professional appointment procedure of a justice portfolio may allow interference with the EPPO's independence and are fundamentally against the European standards on prosecutorial independence. By completing the provisions of principle contained in the preamble of the EPPO Regulation, namely point 41, the legislator could lay down that the Council and the European Parliament may only consider the criteria set out in the EPPO Regulation and the evaluation of the selection panel in the appointment procedure. This would provide an additional element of guarantee to prevent political considerations from entering into the appointment.

Appointment of the European prosecutors

The appointment procedure of the European Prosecutors left room for criticism. The direction of these critics was opposite to those regarding the appointment of the ECP. A state of *quasi* misalignment emerged between the national selection panels and the European selection panel. As a result, and without any reason or public deliberation, the Council has decided to choose a candidate other than the one recommended by the national selection panel in case of Belgium, Bulgaria and Portugal. This led to public criticism from many sides. Austria, Estonia, Luxembourg and the Netherlands published a statement, as “*competition between rankings of national selection panels and the ranking of the European selection panel must be avoided, at the risk of eroding the European component of the appointment procedure*”.⁶⁶ The Members of the European Parliament have sent plenty of questions regarding the fairness of the procedure to the Council and the European Commission.⁶⁷ Notwithstanding, legally appropriate as they may be, most of the parliamentary questions have been declined by arguments holding that the selection panel's decision does not bind the Council. Nor did the European Commission consider that the independence of the EPPO was jeopardised by the Council Implementing Decision 2020/1117.⁶⁸ Legal professionals, however, stated that the Council disrespected the integrity of the appointment procedure, and thus undermined the credibility of the independence of the EPPO. While it has been recognised that the Council is not legally bound by the ranking of the selection panel, they would have expected the Council to provide reasons for the derogation since the European selection panel is also obligated to justify. They presumed that the Council has replaced the ranking of the national selection panel with those of the national governments, and they criticised the lack of reasons provided by the Council to

65. European Parliament, LIBE Committee Newsletter (November 2019), <https://www.europarl.europa.eu/cmsdata/188362/LIBENewsletter_November2019-original.pdf> accessed on 20 December 2020, p 6.

66. European Parliament, Monika Hohlmeier (PPE), Caterina Chinnici (S&D), Viola Von Cramon-Taubadel (Verts/ALE), Sophia in 't Veld (Renew), Question for written answer E-005286/2020 to the Council (28 September 2020).

67. European Parliament, Katalin Cseh (Renew), Ramona Strugariu (Renew), Petri Sarvamaa (PPE), Daniel Freund (Verts/ALE), Priority question for written answer P-005542/2020 to the Council (9 October 2020); European Parliament, Paulo Rangel (PPE), Lídia Pereira (PPE), José Manuel Fernandes (PPE), Maria da Graça Carvalho (PPE), Álvaro Amaro (PPE), Cláudia Monteiro de Aguiar (PPE), Priority question for written answer P-004992/2020 to the Council (11 September 2020).

68. European Commission, Answer given by Mr Reynders on behalf of the European Commission to the parliamentary question [E-005287/2020](#) (26 November 2020).

deviate from the shortlist. They called upon the European Parliament to seek the annulment of the Council Implementing Decision 2020/1117 before the CJEU as it violates the rule of law.⁶⁹

Besides legality, it is also important to adopt a legitimate and controllable decision. These are necessary conditions of public confidence, which is crucial for an independent prosecutorial body. Indication of a clear and sufficient reasoning behind the transparent decisions is the only way to build trust concerning the political independence of the procedures. The problems encountered in the appointment of the European Prosecutors can be traced back to the comments made in the previous points.

Conclusions

In this article, we underlined the importance of the appointment procedure in ensuring prosecutorial independence. Both the Venice Commission and the CCPE stressed that the lack of transparency in the appointment and the weakening of public confidence are vulnerabilities to independence, while agreeing on the importance of having an independent selection body in the process. The current rules on the appointment of the ECP and the European Prosecutors contain a number of vulnerabilities with a potentially negative impact on the independence of the prosecutors, as confirmed by the experience of recent appointment procedures.

The selection panel plays a prominent role in the appointment of the ECP and the European Prosecutors (although the appointment procedure is different) but the lack of transparency in the selection of the members of the selection panel may jeopardise the independence of the selection panel itself, which may have an indirect impact on the independence of the EPPO prosecutors. The members of the selection panel are appointed by the Council on the basis of a proposal from the European Commission, without being able to assess the persons proposed as members of the panel itself. Consequently, in order to enhance the independence of the persons proposed as members for the selection panel and the transparency of the nomination, it would be necessary to impose obligation to the European Commission to provide detailed reasons as. These should include the fact that the relevant criteria were examined individually and in detail during the nomination process, and their results in relation to the candidates, taking into account their individual qualities.

Decision-making in the selection panel is the “grey area” of appointment procedures under the current rules. The transparency of this should be improved by amending point IV of Decision (EU) 2018/1696 accordingly, requiring the selection panel to disclose, at least ex post, the criteria used to rank and exclude candidates and whether their assessment criteria is fully in compliance with the relevant EU legislation. Involving the CJEU into the complaint procedures should not be *a priori* discarded when a candidate is refused.

Summing up the experience of the specific appointment procedures, in line with the criticisms of the European Parliament, it can be seen that the Council itself cannot carry out a professional assessment of the candidate, does not hold hearings and can therefore rely solely on the assessment of the selection panel. If the Council does not accept the assessment of the selection panel and changes the order of the candidates, as it did, there is a suspicion of a political assessment in view of the above-mentioned peculiarities. In order to avoid this, it would be worth considering adding to the EPPO Regulation a safeguard provision requiring the Council to state its reasons in the

69. Miguel Poiars Maduro, ‘Open letter to the European Parliament: Call out the EU Council on its rule of law hypocrisy’ (Euronews, 4 October 2020) <<https://www.euronews.com/2020/10/03/open-letter-to-the-european-parliament-call-out-the-eu-council-on-its-rule-of-law-hypocrisy>> accessed 22 December 2020.

appointment procedure. Strengthening the transparency of the Council's decision-making in this special procedure would prevent institutional conflicts. Despite the fact that the Presidency of the Council does not have direct effect on the voting behaviour of the Member States, with various deals and cross-subsidies, it has more influence to the process than others, especially when the president's own nationality is affected in the appointment. Such interference can be mitigated by total transparency.

Political considerations should also be avoided during the assessment of the European Parliament. By completing the EPPO Regulation the legislator could lay down that the Council and the European Parliament may only take into account the criteria set out in the EPPO Regulation and the evaluation of the selection panel in the appointment procedure. This would provide an additional element of guarantee to prevent political considerations from entering into the appointment.

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