

The Independence of the European Public Prosecutor's Office

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Article

ABSTRACT

An efficient and impartial European public prosecution service cannot exist without effective external independence from the EU institutions and the Member States and internal autonomy of its members.

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An efficient and impartial European public prosecution service cannot exist without effective external independence of the EU institutions and the Member States. Likewise, the internal autonomy of its members is of utmost importance. The idea of independence has been underscored from the project's inception in the late 1990s to Regulation 2017/2019¹ (hereinafter, the Regulation), which ultimately established the European Public Prosecutor's Office (EPPO). In fact, independence is one of the EPPO's main, if not its most important feature. It is an essential guarantee against abuse of power, which is not only in the prosecutors' own interests but also in the interest of society itself and in the interest of the rule of law.

Thus, the Regulation emphasises this fundamental principle by categorically establishing in Art. 6 that the EPPO shall be independent and act in the interest of the Union as a whole. This central provision also stipulates that the EPPO shall refrain from seeking or taking instructions from any person or entity outside it while at the same time obliging Member States and EU entities to respect the EPPO's independence.

Moreover, the Regulation does not merely affirm this external independence but also lays down specific rules to ensure that independence, in line with the case law of the European Court of Human Rights reiterated by the Venice Commission.² These rules relate *inter alia* to the manner of appointment of the EPPO's prosecutors, the duration of their terms, and the existence of guarantees against external pressures, including decision making on budgetary matters.

With regard to the European Chief Prosecutor and the European Prosecutors (EPs), the Regulation requires them to be professionals whose independence is beyond doubt. It also provides for selection and appointment procedures that, in principle, should confirm their independence, as they involve international selection panels and different EU institutions.³ In the same vein, their non-renewable terms and the fact that the decision on their dismissal is entrusted to the European Court of Justice will act as safeguards of their independence.

The Regulation also advocates the external independence of the European Delegated Prosecutors (EDPs)⁴ who are clearly more exposed to external pressure, as they will directly carry out the EPPO's proceedings in their respective Member States. In these cases, however, and although the appointment of the EDPs is a matter for the EPPO College, their selection is assigned to the Member State; the College may only reject those candidates who do not fulfil the legal requirements. It is also worth noting that EDPs are recruited for a renewable term of five years and will eventually return to their national systems. Furthermore, the Regulation allows for the possibility of so-called "double-hatted" prosecutors, who will exercise their functions both within the EPPO and in their national prosecution services, making them subject to two different sets of rules, two sets of disciplinary proceedings, and, in certain cases, two chains of command.

It is clear from the above that mechanisms need to be put in place to ensure the EDPs' independence. To this end, the Decision of the College on the conditions of employment of the EDPs has explicitly established the EPPO's assistance to EDPs in the event of personal threats or damages resulting from the proper discharge of their functions. With the same objective, the College has also decided to specifically regulate the disciplinary offences and sanctions applicable to EDPs. Likewise, the College must pay special attention to the rules for the assignment and reassignment of cases between EDPs.

Ultimately, as stated above, the external independence of the EPPO is also linked to the allocation of sufficient financial resources in order to fulfil its mandate and linked to the necessary budgetary autonomy to manage them. As established by the Regulation, adequate financing of the EPPO lies with both the EU, through the general budget of the Union, and with each participating Member State, as they are obliged to provide their EDPs with the resources and equipment needed to carry out their duties.⁵

Along with this external independence, the internal autonomy of prosecutors handling the EPPO's cases is necessary to ensure the protection of citizens' rights, in particular the rights to a fair trial and to equality before the law. This encompasses objective and impartial performance of the prosecutors' duties. In the context of the internal dimension of independence, the hierarchical system established by the Regulation, which requires EDPs to comply with the instructions of the Permanent Chambers and the EPs, does not breach internal independence, since the Regulation provides for checks and balances that aim at ensuring the discharge of prosecutorial functions impartially and in accordance with the principle of legality. These checks and balances include making it impossible for the Permanent Chambers to dismiss a case that an EDP has proposed bringing to judgment⁶ and making it possible for the EDPs to request the review of the instructions received.⁷ In order to enable such a review, the internal rules of procedure adopted by the College foresee the relevant procedure, assigning the final decision to a Permanent Chamber other than the one that issued the instruction, so that three more EPs examine whether the instruction is legally compliant. In any event, if the EDPs disagree with said decision, their replacement might be considered, as recommended by the Council of Europe.⁸

As regards impartiality and objectivity, the Regulation explicitly lays down the EPPO's duty to act in an impartial manner, seeking all relevant evidence – whether inculpatory or exculpatory.⁹ It also prohibits the intervention of an EP in proceedings where a conflict of interests may exist.¹⁰ In this respect, the internal rules of procedure adopted by the College regulate the procedure for the substitution of EPs and EDPs in case of conflicts of interest in order to ensure their impartiality.

Ultimately, one more important aspect should be mentioned: independence cannot be understood without accountability. As with any authority granted power in democracy, the EPPO is accountable to the society it serves. Thus, the Regulation imposes an obligation on the EPPO to issue annual reports on its general activities,¹¹ stressing the necessary transparency in order to build credibility.

In short, the EPPO Regulation has laid the foundation for ensuring the independence of the new body, but its effective implementation requires joint and determined action by those who make up the EPPO, the EU institutions, and the Member States. This independence will enable the EPPO to discharge its functions fairly and effectively, improve public trust in justice, and serve as an example for other public prosecutors' offices.

1. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31 October 2017, 1. ↪

2. CDL-AD(2016)007, Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016). ↪

3. Arts. 14 and 16 of Regulation 2017/1939. ↪

4. Art. 13 of Regulation 2017/1939. ↪

5. Arts. 91 and 96 of Regulation 2017/1939. ↪

6. Art. 36 of Regulation 2017/1939. ↪

7. Recital 34 of Regulation 2017/1939. ↪

8. Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system. ↪

9. Art. 5 of Regulation 2017/1939. ↪

10. Art. 12 of Regulation 2017/1939. ↪

11. Arts. 6 and 7 of Regulation 2017/1939. ↪

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