

THE FUTURE AND THE ROLE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE IN SLOVENIA

Mojca Rep, MSc¹

Associate Judge at the District Court Celje;
Mediator in criminal cases at the Higher Court in Ljubljana, Slovenia

Abstract: Article 86 of the Treaty on the Functioning of the EU mentions the rules regarding the establishment of the European Public Prosecutor's Office, an institution that will have to be completely independent of any government and designed to prosecute fraud involving fraud of European funds. Based on activities related to the appointment of two European delegated prosecutors, the State Prosecutorial Council sent the proposal to the Ministry of Justice on 3 December 2021. The Government of the Republic of Slovenia was also informed of the proposal and expressed interest in annulling the entire appointment procedure. According to the State Prosecutor General Drago Šketa, the latter could constitute an arbitrary interference with the independence and autonomy of the State Prosecutor's Office, and an illegal and unconstitutional decision. Appointment procedures must be regulated by law and carried out transparently, on the basis of objective criteria in impartial procedures without any discrimination.

Keywords: legislation, European Union, European delegated prosecutor, independence, public prosecutor's office.

INTRODUCTION

The protection of the financial interests of the European Union has been one of the main priorities in the Republic of Slovenia in recent years, as it is considered that these are the funds that have been given to us and must be spent in every way possible. The awareness that the financial resources from various European Union funds are in fact our own resources has encouraged the development of mechanisms to control the allocation and use of European financial resources at national level. The misuse of European funds is often also a crime committed with a special form of intent and a motive for obtaining illegal material gain. The Republic of Slovenia adopted the Convention on the Protection

¹ mojca_rep@yahoo.com



of the European Communities' Financial Interests Act (2007), including its protocols. With the signing of the Treaty of Lisbon, which was incorporated into our legal system by the Act on Ratification of the Treaty of Lisbon, which amends the Treaty on European Union and the Treaty establishing the European Community, the three-pillar order of the European Union was abolished. Therefore, from then on the common policy took place within the framework of the European Union, which also acquired the status of a legal entity. Interinstitutional cooperation at international and national level is crucial to the fight against fraud to the detriment of the European Union (Rep, 2021).

THE IDEA OF ESTABLISHING A EUROPEAN PUBLIC PROSECUTOR'S OFFICE

The first idea to create a European form of FBI appeared around 1989. This body should be independent and autonomous, and should take care of the European budget, which the Member States were not protecting well enough. The idea did not take effect, so over time, Eurojust was set up, which represents the coordinating body and not the law enforcement authority. The prosecution of criminal offenses was considered to be the responsibility of the Member States and not of the European Union (hereinafter: EU), so the Member States did not want to hand over the "power" (Rep, 2021).

Three years ago, however, the European Commission made a proposal again for the European Public Prosecutor's Office (hereinafter: EPPO). The European Commission has obtained the statistics from European Anti-Fraud Office (hereinafter: OLAF) which showed that Member States do not sufficiently prosecute criminal offenses that threaten the financial interests of the EU. The Member States have referred cases of such offenses to the OLAF, which however, had only an administrative role, and therefore referred the cases back to the Member States. There was a statute of limitations, which in turn made some cases obsolete, and only 10% of cases have been shown to be successful. It is therefore necessary to establish a European institution of law enforcement and indictment. From the first ideas about the EPPO to date, however, there have been changes in the legal framework (Quirke, 2007). The Criminal Code of the Republic of Slovenia enables the prosecution of all criminal offenses, which are also envisaged by the Corpus Juris. At the same time, in conjunction with the Corpus Juris, the Commission proposed the adoption of the EPPO (Rep, 2021). If market opening and globalization contribute to reducing inequality, at the same time this process is dangerous, as criminal cases move more easily and exploit differences and litigation. To effectively combat this, we must not be limited to national borders, but need to devise new measures to remove all obstacles and threats and reduce international crime. Article 86 of the Treaty on the Functioning of the European Union mentions the rules concerning the establishment of the EPPO. The article provides that, in order to combat infringements affecting the EU's financial interests, the Council may, by means of regulations adopted in accordance with a special legislative procedure, establish the EPPO from Eurojust. The EPPO is a decentralized unit of the EU judges with exclusive competence to investigate, prosecute and charge the perpetrators of crimes against the EU budget (European Parliament, 2014). In 2000, a proposal to set up the EPPO was made by the European Commission in Nice. It was primarily rejected by the European Council. The basic purposes of setting up the EPPO are to unify the powers to investigate and prosecute perpetrators of crimes against the EU's financial interests. Currently, there is no uniform policy for the prosecution of fraud, as it is left to the competent authorities of each of the Member States (Vukelić, 2013). As the Community institutions and the Member States were aware of the importance of effective protection of financial interests in the Community and as the protection did not go as planned despite many years of effort, the Commission proposed a Directive of the EP and



the European Council on the Protection of Legal Interests in the Community. The starting point for the proposal is the Treaty establishing the European Union. The basis for the decision was the sharp increase in damage caused to the European budget through fraud and financial crime, which led to a situation that required priority treatment of legal instruments for the protection of financial interests (Proposal for a Directive of the European Parliament and the Council of the criminal law protection of the Community financial interest, 2001).

The EPPO is appointed by the Council in agreement with the European Parliament, and the pre-appointment procedure will be based on a call for tenders, on the basis of which the Commission will draw up a list of candidates. An individual seven-member body, consisting of former judges of the Court of Justice of the EU, members of national supreme courts, public prosecutors' organizations and renowned legal experts, will give an opinion on each candidate. The European Public Prosecutor will be responsible for the exercise of the powers of his office to the European Parliament, the Council and the European Commission, with general responsibility for the exercise of his powers (Gorkič, 2013). However, the structure of the European Public Prosecutor is decentralized, as he is expected to exercise his powers in all Member States and his procedural position will still depend to a large extent on national arrangements – both at the investigation stage and beyond. It is therefore inevitable that a prosecutor with knowledge of national law appears before the courts of the Member States, which is made possible by a decentralized structure. European Delegated Prosecutors will be members of the EPPO, but also members of national prosecutors' organizations, and, when acting as members of the Office, will be responsible for conducting investigations and representing prosecutors in cases falling within the remit of the EPPO. Thus, the proposal for a regulation adopted the so-called two hats system. The European Delegated Prosecutor will be a prosecutor who will be able to act either as a domestic prosecutor, national prosecutor or as a member. The decentralized model, however, brings a distinctly monocratic, hierarchical structure to the office. The Office will be externally represented by the European Public Prosecutor, all actions of the Office members will be considered the actions of the European Public Prosecutor and the latter will have clear powers to give general and specific instructions to the European delegated prosecutors. The European Public Prosecutor is an independent legal entity and all those who make up the EPPO may seek or not seek instructions from others (Member States, EU bodies or institutions, etc.). The Office also operates fairly independently in drawing up and adopting its own budget, leaving the final approval to the bodies responsible for the EU's general budget. Regarding the implementation of the budget, the Office of the European Public Prosecutor is under the supervision of the European Anti-Fraud Office and the European Court of Auditors (Gorkič, 2013).

(NON)SELECTION OF DELEGATED PROSECUTORS: SLOVENIAN CASE

The EPPO became operational on June 1, although until then only Finland and Slovenia had not nominated delegated prosecutors out of the 22 participating EU Member States. Finland, meanwhile, has already reached an agreement with the EPPO, while Slovenia has not. The Government of the Republic of Slovenia has not been acquainted with the proposal of the State Prosecutor's Council for the appointment of two European delegated prosecutors until May 2021. Therefore, the public call, on the basis of which two candidates were selected, was unsuccessful, as it was no longer eligible. Candidates for European Delegated Prosecutors, Tanja Frank Eler and Matej Oštir, only received a mail from the government and were therefore officially informed that the government would not send their names



to the EPPO. As explained in the administrative court, the candidates have 30 days from the service of the administrative act to file a new lawsuit. The Administrative Court dismissed the candidates' first lawsuit on the grounds that they had filed it prematurely, as they had not yet received the government's decision. It is not known how the then Minister of Justice Lilijana Kozlovič commented on the matter. Kozlovič has always argued that changes to the prosecutor's law will not affect the open procedure (Žerjavič, 2021). Both candidates were neither confirmed nor named. Prosecutors Tanja Frank Eler and Matej Oštir filed a lawsuit and a request for an interim injunction in the event that European delegated prosecutors were not appointed. Both filed a lawsuit against the government's decision taken on May 27, 2021. More than a month ago, the Administrative Court rejected the first lawsuit and the request for an interim injunction in the event that European delegated prosecutors were not appointed, the reason being that the plaintiffs filed the lawsuit prematurely, as they had not yet received the government's decision not to be informed about the appointment of European delegated prosecutors (Slovenian Press Agency, 2021).

According to media reports, the General Secretariat of the Government prepared a decision by which the government stopped and annulled the entire process of appointing European delegated prosecutors, and at the same time issued a new call for applications. According to the assessment of the General State Prosecutor Drago Šketa, the government's annulment of the entire process of appointing European delegated prosecutors could represent an arbitrary interference with the independence and autonomy of the State Prosecutor's Office. The government's decision would be illegal and unconstitutional, as it changes the tender conditions retrospectively, Šketa said. A response was also made in the Public Prosecutor's Council, noting that the proposal was drafted in accordance with the law in force at the time, which transposed the provisions of the EU Council Regulation on enhanced cooperation in connection with the establishment of the EPPO. The Council reiterated that both proposed candidates met all the conditions prescribed by the law and other regulations in force at the time of the decision, which were set out in the published public tender. The candidates also met the conditions brought into Slovenian law by the Act Amending the Public Prosecutor's Office Act, adopted following the drafting of a proposal by the State Prosecutorial Council for the appointment of two European delegated prosecutors (A.Č., S.K., P.Ž., 2021). All proceedings must be initiated, conducted and completed in accordance with regulations, the State Prosecutor's Council rightly expected that the proceedings in question would be completed legally, taking into account the legal powers of individual actors in the proceedings, as well as the constitutional prohibition of retroactive legal acts is also the opinion of the President of the State Prosecutor's Council Tamara Gregorčič (Supreme State Prosecutor's Office, 2021).

On July 9, 2021, the Ministry of Justice published a new call for candidates for European Delegated Prosecutors in the Official Journal. The summons was published on the basis of Articles 71c and 71d of the Public Prosecutor's Office Act. The Ministry of Justice has received two applications for a repeated tender for European delegated prosecutors from Slovenia, the ministry confirmed to STA. Prosecutors Matej Oštir and Tanja Frank Eler, who had already been selected in the first call, applied. Oštir and Frank Eler confirmed before media that they had also applied for the repeated tender. The State Prosecutor's Council selected them after the first tender; however, the government did not take note of the proposal, but instead annulled the procedure. According to the government, the State Prosecutor's Council should propose three candidates for each position, i.e. a total of six candidates, while the State Prosecutorial Council proposed only two. The Ministry has already stated that it wants and strives for constructive cooperation of all stakeholders for the appointment of delegated prosecutors as soon as possible. If the government repealed the process of appointing European prosecutors, this, according to Attorney General Šketa, could be unconstitutional. The Council of State Prosecutors, which is responsible for the choice between the registered candidates and the submission of the proposal to

the government, warned when the repeated call was published that it was illegal. According to the Council, in the absence of an interpretation of the legal provisions by the court, they would follow the government's arbitrary interpretation of the regulations and thus confirm its illegal decision-making (M.Z., K.T., 2021). The prosecutors' association believes that the government is only delaying the appointment with the new procedure, as the government is now expecting six candidates, and the deadline for submitting candidacies is 15 days after the announcement of the call. The State Prosecutor's Council warns that the new call is illegal. Article 71c of the State Prosecution Service Act stipulates in the fifth paragraph that the Public Prosecutor's Council must draw up a list of three candidates for the appointment of a European prosecutor, which the Ministry of Justice then forwards to the government for submission to the competent EU institution. This means that he has to draw up a list of three candidates for both available positions, a total of six. As he announced, in the absence of an interpretation of the legal provisions from the court, he would follow the government's arbitrary interpretation of the regulations by re-deciding, thus confirming its illegal decision-making. This would undoubtedly raise doubts about the legitimacy of the appointment of European delegated prosecutors in such a repeated procedure, which could in turn jeopardize the successful prosecution of cases within the competence of the EPPO in Slovenia. The State Prosecutor's Council has already informed Chief Prosecutor Laura Kövesi of the matter. In a press statement, the President of the State Prosecutor's Council, Tamara Gregorčič, once again pointed out that the government's decision to annul the procedure was illegal, and consequently the last published public call was also illegal (Slovenian Press Agency, 2021).

In a statement for Slovenian Press Agency, the Supreme State Prosecutor Mirjam Kline from the Association of State Prosecutors warned that there was no basis for three names to be on the candidate list twice. The position of the Public Prosecutors' Association is that the first tender, which was annulled, was legal, in accordance with the Public Prosecutor's Office Act, a regulation of the EU Council and in accordance with the Constitution, she emphasized. According to Mirjam Kline, the Association of State Prosecutors expects the selected candidates to file a lawsuit, because this is obviously the only way to establish through a court decision that the government's move to annul the already completed tender procedure was illegal and that the procedure was led by the Public Prosecutor's Council, in full compliance with the Public Prosecutor's Office Act and a regulation of the EU Council, she stressed. According to the Public Prosecutor's Council, the government arbitrarily annulled the already completed call without any legal basis, six months after the end of the call, when it should have only read the names of the two candidates and sent them to the EPPO. Kline points out that the selection of candidates for European Delegated Prosecutors can only be made by the Public Prosecutor's Council on the basis of current legislation (Felc, 2021). After the media reported the intention of the Government of the Republic of Slovenia not to get acquainted with the proposal of the State Prosecutor's Council regarding the appointment of two European delegated prosecutors, the Supreme State Prosecutor's Office annulled the procedure. Such a decision of the Government of the Republic of Slovenia would be arbitrary, it would interfere with the independence and autonomy of the State Prosecutor's Office, which is also ensured through appointment procedures, which must be regulated by law and carried out transparently and on the basis of objective criteria. The EPPO is an institution that must be completely independent of the government and is intended to prosecute crimes related to fraud in the use of European funds, said Prosecutor General of the Republic of Slovenia regarding complications in appointing European delegated prosecutors (A. P. J., G. C., K. T., 2021). In the case of the adoption of a decision to annul the selection procedure, in our opinion it is an illegal decision, contrary to the Constitution of the Republic of Slovenia, as it changes the tender conditions retrospectively. It should not be overlooked that both proposed candidates for European Delegated Prosecutors meet all the conditions set out in the call and the law, and the procedure was carried out correctly and legally. The latter also derives from the proposal of the Public Prosecutor's Council, from the proposal of the Min-



istry of Justice, the opinion of the Government Office for Legislation, the opinion of the Office of the European Prosecutor General and the opinion of Mr. Šketa (Felc. 2021).

European Chief Prosecutor Laura Codruța Kövesi also responded to the statement of the Prosecutor General of the Republic of Slovenia, expressing concern over the situation and stating her belief that the Slovenian government would avoid interfering with the independence of prosecutors. The new tender has further complicated the appointment of prosecutors, warns former Minister of Justice Aleš Zalar. The European Union will not get delegated prosecutors from Slovenia for a long time, which is a specific concern. European Commissioner for Justice Didier Reynders has again called on Slovenia to appoint delegated prosecutors, as it is the only one of the 22 participating countries that has not yet appointed any prosecutors. Calls for the appointment of Slovenian candidates from Brussels have been coming since the end of May 2021, when the former Minister of Justice Lilijana Kozlovič resigned due to the situation (M. Z., K. T., 2021). In June 2021, after the end of the informal meeting of the EU justice ministers in Brdo, Slovenia, the Slovenian government was again criticized for not appointing European delegated prosecutors. European Justice Commissioner Didier Reynders has made it clear that they will take action if the government does not appoint prosecutors quickly. At present, they can work for a certain extraordinary period through a Slovenian prosecutor in the College of the EPPO. However, it is important that the Slovenian authorities act very quickly. The importance of the Prosecutor's Office for the protection of the European Union budget was also emphasized. In June, the Ministry of Justice published a new call for candidates in the Official Gazette. However, the state prosecutor's council warned that the call was illegal. As they reported, if the court did not clarify the statutory provisions, it would take into account the government's arbitrary interpretation of the regulations by re-ruling and thus confirm its illegal decision-making (Felc, 2021).

In its report on the rule of law in Slovenia, the European Commission also draws attention to unjustified delays in the appointment of state and European prosecutors and to the deteriorating situation of media freedom and pluralism. "If this policy continues, sooner or later there will be sharper assessments than those experienced by Hungary and Poland," warns former constitutional judge Lojze Ude. Lawyer Rajko Pirnat believes that not naming European prosecutors is just the tip of the iceberg (Mlakar, 2021).

CONCLUSION

The EPPO was set up to increase the level of protection of the European Union's financial interests. This institution of enhanced cooperation represents more of Europe and is an important opportunity to fight corruption and act to the detriment of European Union funds. The EPPO can start operating without Slovenian European prosecutors, but this may mean that the level of protection of the EU's financial interests in Slovenia will decrease. The very way of selection procedures so far represents a very serious interference with the justice, the rule of law and the independence of prosecution. The new public call for nominations for the appointment of two European delegated prosecutors is already considered unsuccessful by law. However, the primary procedure for the nomination of candidates by the Ministry of Justice was carried out legally, in accordance with national legislation and the EU Council Regulation on the EPPO. Compliance with applicable law and its procedures ensures legal certainty and thus the rule of law. The process of appointing two European delegated prosecutors from Slovenia has been going on for several months, because the candidates proposed for this position by the State Prosecutor's Council, Matej Oštir and Tanja Frank Eler, are allegedly disruptive for the Prime Minister. The government has never been informed of the proposed candidates, although the Euro-



pean Commission has repeatedly called on Slovenia to take action, as the EPPO was expected to start operating on June 1. According to the first prosecutor in the country, the government's annulment of the entire procedure represents an arbitrary encroachment on the independence and autonomy of the state prosecutor's office. The European Commission has issued a second Rule of Law Report, which aims to review key changes in the EU and the situation in the Member States and to contribute to promoting a strong political and legal culture of the rule of law throughout the EU. In this report, the unjustified delay in the appointment of state prosecutors is pointed out and it is summarized that, since the end of July 2020, the State Prosecutorial Council has submitted the names of 29 candidates to the Minister of Justice, who then proposed them to the government for appointment or promotion. By June 2021, only 14 of these had been nominated or promoted, while there were no clear reasons for not deciding on the remaining 15 candidates. The untimely appointment of European Delegated Prosecutors is also a cause for concern, stressing that in line with the Council of Europe's recommendations, the recruitment of public prosecutors should be carried out through fair and impartial procedures, including safeguards against any approach representing the interests of certain groups. However, they are governed by well-known and objective criteria, such as qualifications and experience, which the state prosecutor's office has always pointed out.

REFERENCES

1. A.Č., S.K., P. Ž. (2021). Janša would review the process of appointing prosecutors, Šketa sharp because the process stopped. *Delo*. Accessed on June 2. 6. 2021 <https://www.delo.si/novice/slovenija/sketa-razveljavitev-postopka-imenovanja-tozilcev-bi-lahko-bila-nezakonita/>
2. P. J., G. C., K. T. (2021). The Public Prosecutor's Council is announcing a lawsuit over the government's complication with European prosecutors, *RTV SLO*. Accessed on June 4, 2021 <https://www.rtvlo.si/evropska-unija/drzavnotozilski-svet-napoveduje-tozbo-zaradi-vladnega-zapleta-z-evropskimi-tozilci/582372>
3. Convention on the Protection of the European Communities' Financial Interests Act (2007). Official Gazette No. 19/07 – International Contracts, No. 4/07.
4. European Parliament. (2014). *About the Parliament*. Accessed on June 2, 2014 http://www.europarl.europa.eu/aboutparliament/sl/displayFtu.html?ftuId=FTU_1.5.5.html
5. Felc, M. (2021). Government procrastination is already causing problems in organizing work. *Delo*. Accessed on June 1, 2021 <https://www.delo.si/novice/slovenija/vladno-zavlacevanje-ze-povzroca-tezave-pri-organizaciji-dela/>
6. Gorkič, P. (2013). Evropski javni tožilec: zdaj gre (zares) zares, *Pravna praksa*, 34, 22.
7. M. Z., K. T. 2021. New call for selection of delegated prosecutors, the State Prosecutor's Council declared it illegal. *RTV SLO*. Accessed on June 4, 2021 <https://www.rtvlo.si/slovenija/nov-poziv-za-izbor-delegiranih-tozilcev-drzavnotozilski-svet-ga-je-oznail-za-nezakonitega/587099>
8. Mlakar, L. (2021). Pirnat on the Brussels report: This is just the tip of the iceberg. Ude: If this continues, there will be assessments as received by Hungary and Poland. *Delo*. Accessed on June 1, 2021 <https://www.vecer.com/slovenija/odzivi-pirnat-o-porocilu-bruslja-to-je-samo-vrh-ledene-gore-ude-ce-se-bo-to-nadaljevalo-bo-prislo-do-ocen-kot-sta-jih-doživeli-madžarska-in-poljska-10248250>



9. Proposal for a Directive of the European Parliament and the Council of the criminal law protection of the Community financial interest (2001). European Parliament. Accessed on May 1, 2021 <https://www.europarl.europa.eu/sides/getDoc.do?reference=A5-2001-0390&type=REPORT&language=EN&redirect>
10. Rep, (2021). Possibility of abuse or protection of EU financial interests in Slovenia? 12th International Scientific Conference 30 YEARS OF INDEPENDENT MACEDONIAN STATE, Ohrid, Republic of North Macedonia, 15–17 September, 2021. Faculty of Security – Skopje.
11. Slovenian Press Agency (2021). The Ministry of Justice has issued a new call for the selection of delegated prosecutors, Accessed on June 9, 2021 <https://www.sta.si/2921571/ministrstvo-za-pravosodje-objavilo-nov-poziv-za-izbor-delegiranih-tozilcev>
12. State Prosecution Service Act. *Official Gazette* No. 54/21.
13. Vukelić, M. (6. 8. 2013). Over money fraud in the EU with the European Public Prosecutor. *Delo.si*. Accessed on May 26, 2021 [http://www.delo.si/novice/slovenija/nad-denarne-](http://www.delo.si/novice/slovenija/nad-denarne-goljufije-v-eu-z-evropskim-tozilcem.html)
14. [-goljufije-v-eu-z-evropskim-tozilcem.html](http://www.delo.si/novice/slovenija/nad-denarne-goljufije-v-eu-z-evropskim-tozilcem.html)
15. Žerjavčič, P. (2021). Deep concerns about European delegated prosecutors from Slovenia, *Delo*, Accessed on June 9, 2021 <https://www.delo.si/novice/slovenija/globoke-skrbi-glede-delegiranih-tozilcev-iz-slovenije/>
16. Quirke, B. (2007). OLAF: The fight against EU fraud. *Journal of Financial Crime*, 14 (2), 178–189.