ECJ case law on judicial independence
A chronological overview

SUMMARY

In recent years, European Court of Justice (ECJ) case law has been playing an increasingly pivotal role in the development of the emerging common minimum standards of judicial independence, binding on the EU Member States as a matter of Union law. The ECJ has based its case law primarily on Article 19 of the Treaty on European Union (TEU), which requires Member States to provide for effective judicial protection in areas covered by EU law, on Article 47 of the Charter of Fundamental Rights of the EU (CFR), which requires Member States to guarantee a fair trial and effective judicial protection when implementing EU law, and on Article 2 TEU, which includes the rule of law among the values that are common to the Member States and to which they have committed when joining the EU (as required by Article 49 TEU). The ECJ sees the development of common minimum standards of judicial independence as necessary not only for national courts to guarantee effective judicial protection but also to preserve the mutual trust between national judiciaries within the EU.

In its case law on judicial independence, the ECJ has focused specifically on the autonomy of the judiciary from the other branches of government (legislative and executive), on citizens' perceptions of independence, and on specific guarantees of independence within appointment procedures and disciplinary proceedings for judges.

Whereas the ECJ has reiterated that laws setting the rules on how the national judiciaries are to be organised is a competence of the Member States, it has also required, given the Member States' Treaty obligations stemming from Articles 2, 19 and 49 TEU and from Article 47 of the CFR, that they may not, following their accession to the EU, lower their standards of judicial independence (principle of non-regression).

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Introduction

The European Court of Justice (ECJ or the Court) has anchored the emerging EU standards of judicial independence in three primary EU law provisions – Article 2 of the Treaty on European Union (TEU), stipulating that the rule of law is a shared EU value of all Member States; Article 19 TEU, which obliges Member States to provide for 'effective legal protection' in the areas covered by EU law; and Article 47 of the Charter of Fundamental Rights of the European Union (CFR), which obliges Member States to respect the fundamental right to a fair trial and effective remedy when implementing EU law (Article 51 CFR).

These three provisions have a different historical and legal background. Article 2 TEU originated in the Treaty of Amsterdam (ex Article 6(1) TEU), which proclaimed the rule of law as one of the founding principles of the EU that are also common to its Member States. The reference to effective legal protection in Article 19 TEU first appeared in the Treaty of Lisbon and was intended to codify ECJ case law, notably the UPA judgment (2002), where the ECJ famously stated that 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'. Finally, Article 47 CFR was intended to codify, within EU law, a rule equivalent to Article 6(1) of the European Convention on Human Rights (ECHR), regarded as a source of general principles of EU law (Article 6(3) TEU).

Reading these three provisions together and subjecting them to a systematic and teleological interpretation, since 2018 the ECJ has been developing a body of common minimum standards of judicial independence, which it considers binding on the Member States as a matter of EU law. Admitting that the organisation of national judiciaries does not per se belong to the sphere of EU competences (Article 5 TEU), the ECJ requires that Member States, when exercising their competences in this area, adhere to the EU rule of law standards. The Court has also rejected arguments based on the national identity clause (Article 4(1) TEU), arguing that effective judicial protection under EU law is required in all areas covered by EU law (Commission v Poland (I)) and that any national court or tribunal that may be called upon to apply EU law must fulfil EU standards of judicial independence as part of the requirement of effective judicial protection.

Chronological overview of recent case law

ECJ (GC) 27.2.2018, C-64/16, Portuguese Judges

A judicial trade union claimed that lowering the salaries of the Portuguese Court of Auditors' members (who enjoy the status of judges) would violate the principle of judicial independence. In an innovative legal argument, the trade union based its claims on Article 19 TEU and Article 47 CFR. The ECJ found that the lowering of judges' salaries, if dictated by a Member State's pressing economic needs, does not violate EU law. However, it used the occasion to provide an interpretation of Article 19 TEU and its concept of effective judicial protection, read in the light of Article 4(3) TEU, which enshrines the principle of sincere cooperation as the basis of Member States' obligations to maintain the judicial independence of their national judiciaries.

ECJ (GC) 25.7.2018, C-216/18, Minister of Justice and Equality

In 2012 and 2013, Ireland received three European arrest warrants (EAW) for a Polish national. Whereas in general the procedure of surrendering persons under the EAW is based on mutual trust between the EU judiciaries, the ECJ had recognised in Aranyosi and Căldăraru (2016) that trust has its limits, if the surrendered person's fundamental rights are at stake. In this context, the Irish court brought a preliminary reference to the ECJ, asking whether, in the context of the referring court being described as committing 'systemic breaches of the rule of law', it could still execute the EAW. In its judgment, the ECJ recognised the existence of systemic deficiencies in judicial independence in Poland but mandated the requested court to analyse whether in the specific case of the requested person there was indeed a risk that his right to a fair trial might be compromised.
Upon receiving the answer, the Irish court decided that there was no such risk and decided to surrender the requested person.

**ECJ (GC) 24.6.2019, C-619/18, Commission v Poland (I)**

Following the compulsory lowering of the retirement age of Polish Supreme Court (SN) judges from 70 to 65 – with the effect of sending a significant number of SN judges into retirement – the European Commission brought a case to the ECJ claiming that Poland had violated Article 19(1) TEU and Article 47 CFR. The Commission argued that although the retirement age had been lowered, the Polish president had received the discretionary power to extend the term of office of judges twice for a total of 6 years, after consulting with the National Judiciary Council (KRS). Thus, if the president decided to extend the term of office of a judge beyond retirement age, they could still serve for up to 6 years more. The ECJ ruled that the above situation was in breach of Article 19(1) TEU, pointing out that while the organisation of justice in the Member States falls within their competence, when exercising that competence they must comply with their obligations under EU law. As regards Protocol No 30 on the application of the CFR to Poland and to the United Kingdom, which the Polish government had referred to in its reply to the ruling, the ECJ noted that the said protocol had no reference to Article 19(1) TEU and did not exempt Poland from the obligation to comply with the CFR (a point already made in Joined Cases C-411/10 and C-493/10).

The ECJ further argued that Article 19(1) TEU requires all Member States to ensure that their national courts that come within its judicial system in the areas covered by EU law meet the requirements of effective judicial protection. It also drew attention to a Venice Commission opinion, which argued that the lowering of the retirement age of SN judges had targeted a certain group of SN judges with the aim to sideline them.

**ECJ (GC) 5.11.2019, C-192/18, Commission v Poland (II)**

In parallel to the above measure, the Polish legislature also lowered the retirement age of ordinary judges at 65 for men and 60 for women, while allowing the minister of justice to extend, in individual cases, the term of office of a judge to the age of 70. The European Commission took Poland to the ECJ, alleging the infringement of Article 19(1) TEU and Article 47 CFR. In its judgment, the ECJ agreed with the Commission and found that Poland had violated Article 19 TEU and the Equal Treatment Directive. The ECJ underlined that the principle of irremovability of judges is of ‘cardinal importance’ and therefore judges must be allowed to ‘remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term.’ The ECJ added that, ‘While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed.’ However, the lowering of the retirement age of all ordinary judges, with the possibility for the minister of justice to make exceptions for selected judges based on ‘vague and unverifiable’ criteria, could ‘create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post’.

**ECJ (GC) 19.11.2018, C-585/18 et al., A.K. v KRS**

As part of a package of judicial reforms, the Polish legislature created a new Disciplinary Chamber (IDSN) within the Supreme Court (SN), to handle disciplinary cases of judges, prosecutors and lawyers, decide on the lifting of judicial and prosecutorial immunity, and handle cases on matters relating to the employment, social security and compulsory retirement of SN and Supreme Administrative Court (NSA) judges. All IDSN judges would be appointed entirely from among new
candidates. At the same time, the legislature adopted an act amending the Act on the National Judiciary Council (KRS), effectively ending the term of office of all existing KRS members and laying down new rules on the selection of its members. Hitherto, the majority of KRS members (15 out of 25) had been elected by judges (judges from higher courts received a preferential treatment), but now it would be the Sejm (lower house of parliament) that would be electing the KRS judicial members. Given that the body is also composed of 4 Sejm members and 2 senators, the parliament would now select 21 out of 25 KRS members.

One NSA judge challenged the KRS' negative opinion that barred him from remaining in service after having reached the age of 65, and two SN judges refused to undergo the new procedure and challenged the president’s declaration pronouncing them retired. All three applicants brought their cases to the SN Labour Chamber, which retained jurisdiction until the new IDSN would become operational. The questions submitted by the Labour Chamber to the ECJ focused on whether, once the IDSN becomes operational, the Labour Chamber should transfer all three cases to it or rather, considering that the IDSN does not provide sufficient guarantees of its judicial independence, the Labour Chamber should refuse to apply the new legislation (which transfers jurisdiction to the IDSN) and handle the cases itself.

In its judgment, the ECJ focused on the role of the KRS in judicial appointments and more specifically on the recent reform that allowed the parliament to appoint the majority of the KRS members. Although the ECJ did not directly evaluate the independence of the IDSN and the legitimacy of the reformed KRS, it gave the referring court specific instructions on how to do it, inviting it to look into such aspects as: 1) the possible irregularities in the appointment of KRS members; 2) the way in which the KRS exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary; 3) whether the KRS is independent from the legislature and executive; 4) the circumstances under which the new judges of the IDSN were being appointed and the role of the KRS in that regard; 5) the new powers of the IDSN with regard to the employment, social security and retirement of SN and NSA judges, coupled with the simultaneous lowering of the retirement age of judges; 6) the requirement for the IDSN to be staffed solely by newly appointed judges, effectively disqualifying existing SN judges from being selected; and 7) the autonomy of the IDSN within the SN. Summarising these comments, the ECJ noted that 'although any one of the various facts referred to ... is indeed not capable, per se and taken in isolation, of calling into question the independence of a chamber such as the [IDSN], that may, by contrast, not be true once they are taken together, particularly if the abovementioned assessment as regards the KRS were to find that that body lacks independence in relation to the legislature and the executive' (para. 153).

Upon receiving the ECJ's answer, the referring court ruled that the IDSN 'is not a court within the meaning of Article 47 CFR and Article 6 of the Convention and Article 45(1) of the Constitution'.

ECJ (GC) 26.3.2020, C-558 & 563/18, Miasto Łowicz

Two Polish judges sought guidance from the ECJ as to whether the new rules on judges' disciplinary responsibility meet the requirements for judicial independence under Article 19(1) TEU. The Polish government argued that rules on disciplinary proceedings against judges were a competence of the Member States and therefore could not be scrutinised under EU law. The government furthermore added that the ECJ’s reply was not necessary to resolve disputes in the main proceedings, as they had nothing to do with the disciplinary responsibility of Polish judges, given the fact that the referring judges were not the subject of any such proceedings. In its judgment, the ECJ agreed with the Polish government that the requests were inadmissible.

ECJ 9.7.2020, C-272/19, Land Hessen

A German court made a preliminary reference in a data protection case, seeking clarification as to whether it was an independent court for the purposes of Article 47 CFR and Article 267 TFEU. The referring court pointed to numerous forms of influence exerted on it by the regional minister of
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justice, which could undermine its independence and impartiality, one specific such instance being the fact that the appointment, appraisal and promotion of judges was in the remit of the said minister. In its judgment, the ECJ pointed out that the documents submitted by the referring court contained 'no indication as to the manner in which the executive uses its powers in that regard are such as to engender legitimate doubts, particularly in the minds of litigants, concerning whether the judge concerned is impervious to external elements and whether he or she is impartial with respect to the opposing interests that may be brought before him or her'. The ECJ concluded that the factors mentioned in the preliminary reference 'cannot, in themselves, be sufficient ground for a conclusion that those doubts are well-founded and that that court is not independent'.

ECJ (GC) 17.12.2020, C-354 & 412/20 PPU, L. and P.

Faced with two European arrest warrants issued by Polish courts, a Dutch court had doubts whether to surrender the two persons for whom the warrants had been issued over to its Polish counterparts or refuse to do so, given the systemic rule of law deficiencies of the Polish judiciary. However, the Dutch court had no specific concerns about the two persons' right to a fair trial, and its question was essentially an attempt to nudge the ECJ into reconsidering its earlier case law. The ECJ upheld its earlier ruling asking the requested court to analyse whether there was a 'real risk' of the breach of the fundamental right to a fair trial, based on 'a specific and precise verification'.

ECJ (GC) 2.3.2021, C-824/18, A.B.

Five unsuccessful applicants for SN judges' posts in competitions organised in 2018 lodged appeals against the KRS resolutions rejecting their applications to the NSA. In its request for a preliminary ruling, the NSA pointed out that following a recent reform, the KRS Act provided that, in individual cases concerning the appointment to the post of an SN judge, unless all participants (including the successful one) in the competition procedure challenge the KRS resolution, the latter would become final, both 1) in the part containing the decision to present the proposal for appointment to the office of an SN judge; and 2) in the part comprising the decision not to present the proposal for appointment to the office of judge to that court for participants in the procedure who did not lodge an appeal. However, as the NSA pointed out, those who win a competition have no interest in challenging the KRS's resolution. In any event, even if the KRS resolution were to be annulled, the successful applicants' applications would not be re-examined if in the meantime the post at the SN has been filled. As a result, judicial review of the KRS's decision to propose certain candidates did not exist.

In its judgment, the ECJ pointed out that the rules on judicial appointments must be laid down in a way that does not 'give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges'. The ECJ went on to say that, given the controversies regarding the appointment of the new KRS members and concerns over the body's independence, the existence of effective remedies against its resolutions was crucial, especially in light of the fact that such remedies were initially available but were then abruptly eliminated. This could create doubts about the independence of judges appointed by the reformed KRS, making the need for judicial remedies against its resolutions all the more important.

Following the ECJ's reply, the NSA annulled the KRS resolutions recommending candidates for judicial posts, adding however that the annulment did not affect the 'systemic validity and effectiveness of presidential acts of appointment to the office of judge of the Supreme Court made on the basis' of the annulled resolutions 'because, in the current legal state, such acts are not subject to judicial review and are not revocable' (NSA 6.5.2021, cases II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18 and II GOK 7/18).
ECJ (GC) 20.4.2021, C-896/19, Repubblika

An NGO challenged a judicial reform in Malta, claiming that the prime minister’s powers to appoint members of the judiciary raised doubts about the independence of those appointees. Ruling on a preliminary reference from the Maltese Constitutional Court, the ECJ pointed out that the reform in question actually strengthened judicial independence by involving a Judicial Appointments Committee. On this occasion, the ECJ also formulated the principle of non-regression with regard to the rule of law, whereby a Member State ‘cannot ... amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law’ and must ‘ensure that ... any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary’.

ECJ (GC) 18.5.2021, C-83/19 et al., Romanian Judges (I)

An association of Romanian judges initiated litigation, in which it challenged various rules on the organisation of the judiciary as being incompatible with EU rule of law standards, including rules concerning the disciplinary responsibility of judges. In its ruling, the ECJ found that the system in place allowed the executive to make interim appointments to management positions at the Judicial Inspectorate (the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges), without following the ordinary appointment procedure laid down by national law. The ECJ observed that this could ‘give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges’, and therefore violates Articles 2 and 19 TEU. Against this backdrop, the ECJ formulated the more general idea that judges, when faced with disciplinary proceedings, must enjoy the guarantees enshrined in Articles 47-48 CFR, more specifically the rights to defence and a fair trial. Rules on appointments to management positions at the disciplinary body must eliminate any reasonable doubt that the powers and functions of that body would not be used as an instrument to exert pressure on, or political control over, judicial activity.

Secondly, the ECJ analysed whether the creation of a specialised section of the Prosecution Service, tasked exclusively with investigating judges and prosecutors, complied with Articles 2 and 19 TEU. The ECJ found it to be a breach of EU law unless it is justified by objective and verifiable requirements relating to the sound administration of justice and is accompanied by specific guarantees preventing any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and provided that judges and prosecutors targeted by the section enjoy the rights under Articles 47-48 CFR.

Thirdly, the ECJ analysed a Romanian law providing for financial liability of judges for committing judicial errors. The law defined these errors as situations where there was a ‘clear breach of provisions of substantive or procedural law,’ and where a final judgment had been delivered ‘that is manifestly contrary to the law or inconsistent with the factual situation established by the evidence taken in the course of the proceedings,’ and is ‘entailing a serious infringement of the rights, freedoms or legitimate interests of an individual, and causing harm that it has not been possible to remedy by means of an ordinary or extraordinary appeal’. The ECJ noted that the above definition of ‘judicial error’ was made ‘in general and abstract terms’. It drew a clear line between state financial liability for judicial errors vis-à-vis individuals who suffered damage (which is in conformity with Articles 2 and 19 TEU) and personal liability of judges for the damages caused by a judicial error, which is problematic from the point of view of judicial independence, because it could be ‘used as an instrument of pressure on judicial activity’.

ECJ (GC) 15.7.2021, C-791/19, Commission v Poland (III)

The European Commission brought an action against Poland alleging that the new rules on the disciplinary responsibility of judges, introduced in 2019, violated Article 19(1) TEU. On 15 July 2021, the ECJ rendered its judgment, finding that – given the context in which it was created and
staffed – IDSN did not provide all the guarantees of impartiality and independence and, in particular, was not protected from the direct or indirect influence of the Polish legislature and executive. This was, inter alia, due to the fact that persons appointed to the DC were vetted by the new KRS, whose independence was doubtful on account of it now being elected exclusively by the legislature and executive (23 out of 25 members).

In this context, the ECJ noted that ‘the premature termination of the terms of office of certain then-serving members of the KRS and the reorganisation of the KRS in its new composition took place in a context in which it was expected that numerous posts would soon be vacant within the [SN], and in particular within the [IDSN]’. This, it concluded, may 'give rise to legitimate doubts as to the independence of the KRS and its role in an appointment process such as that resulting in the appointment of [IDSN judges]'. The ECJ also criticised the rules on the disciplinary responsibility of judges, stating that they made it possible to classify the very content of judicial decisions adopted by judges of the ordinary courts as a disciplinary offence, noting that this could be used as a vehicle for exerting political control over judicial decisions, including for exerting pressure on judges and influencing their decisions. As national judges were being exposed to disciplinary proceedings for deciding to submit a reference for a preliminary ruling to the ECJ, the ECJ found this to be undermining the system of judicial cooperation between the national courts and itself.

ECJ (GC) 6.10.2021, C-487/19, W.Ż. v KRS

The president of a court moved a judge from an appellate body to a first-instance division within the same court. Considering this to be a de facto demotion equivalent to a disciplinary measure, the judge appealed the decision to the KRS. When the latter rejected his application, he brought an appeal to the SN Extraordinary Review Chamber (IKNiSP). However, convinced that the IKNiSP judges lacked independence and impartiality and was no established by law, the applicant brought a request for their recusal to the SN Civil Chamber (ICSN). Whilst the incidental proceedings on recusal were pending, the IKNiSP president issued an order closing the main proceedings (before the IKNiSP) and dismissing the case as inadmissible, although at the time the case file was still with the ICSN and the motion for recusal had not been decided upon. Next, the ICSN three-judge panel submitted a preliminary reference to an extended ICSN seven-judge panel, asking whether the order in question should be considered legally inexistent (sententia non existens), and therefore ignored. The seven-judge panel then submitted a reference to the ECJ. In its judgment, the ECJ ruled that Article 19(1) TEU and the principle of primacy of EU law require, under the specific circumstances of the case, that the ICSN consider the order of the president of the IKNiSP legally inexistent, given the irregularity of the appointment procedure of the latter.

ECJ (GC) 16.11.2021, C-748 & 754/19, W.B. et al.

In a series of criminal cases, a Polish court asked the ECJ about the impact on judicial independence of a provision of Polish law that allows the minister of justice to second judges, including criminal judges, to a higher court, and then to terminate their secondment – whether made for a fixed or an indefinite period – at his will. A judge seconded to a higher court enjoys greater prestige and a higher salary, and the termination of a secondment has impact on both. The ECJ ruled, on the basis of Article 2 and 19 TEU and the Presumption of Innocence Directive (2016/343), that such an arrangement is incompatible with judicial independence because it could create the impression that seconded judges are 'influenced by the fear of termination of the secondment'.

ECJ 21.12.2021, C-357/19 et al., Euro Box Promotion

Article 147(4) of the Romanian Constitution provides that the decisions of the Romanian Constitutional Court (RCC) are binding and must be observed by ordinary courts. Moreover, Law 303/2004 on the status of judges and prosecutors provides that failure to comply with judgments of the RCC constitutes a disciplinary offence. A series of preliminary references by Romanian ordinary courts, merged by the ECJ, focused inter alia on the relationship between these
requirements, on one hand, and the EU standards of judicial independence, on the other. Specifically, the referring courts drew the ECJ's attention to RCC Decision No 104 of 6 March 2018, according to which EU law does not take precedence over the Romanian constitutional order and Commission Decision 2006/928/EC cannot constitute a benchmark in the context of a review of constitutionality under Article 148 of the Romanian Constitution. Responding to the reference, the ECJ ruled that Article 2 and 19 TEU (as well as Decision 2006/928/EC) do not preclude national rules or practices under which the decisions of a national constitutional court are binding on the ordinary courts, provided the constitutional court remains independent of the legislature and executive. However, obliging a national judge to follow constitutional court case law that the ECJ has found incompatible with EU law is incompatible with the principle of primacy of EU law.

ECJ (GC) 21.2.2022, C-430/21, R.S.

In Decision No 390 of 8 June 2021, the RCC ruled that an ordinary Romanian court may not disapply, on its own motion, provisions of Romanian law that it considers incompatible with EU law. It also found that part of the ECJ's judgment in Romanian Judges I is incompatible with the Romanian Constitution. In these circumstances and in the context of the aforementioned Law 303/2004, a Romanian court asked whether: 1) the principle of judicial independence (Articles 2 and 19 TEU and Article 47 CFR) precludes an interpretation of the Romanian Constitution provided for by the RCC, whereby national courts may not review the conformity with EU law of a provision of Romanian law that has been found to be constitutional by the RCC; 2) the principle of judicial independence precludes the application of a rule of Law 303/2004, which provides for disciplinary responsibility for judges who fail to follow the RCC case law, also in cases when a national judge chooses to give precedence to ECJ case law if it is incompatible with RCC case law.

In its judgment, the ECJ, following its earlier case law (Euro Box Promotion), ruled that Article 19(1) TEU in conjunction with Articles 2 and 4(2) TEU and 267 TFEU, and the principle of primacy, must be interpreted as precluding national law or practices that provide for disciplinary responsibility of a judge who departs from the national constitutional court's case law, if that case law is incompatible with the principle of primacy of EU law.

ECJ 22.3.2022, C-508/19, M.F. v J.M. (Prokurator Generalny)

M.F., judge at a local court in Poznań, brought a civil lawsuit against judge J.M., interim president of the Supreme Court’s Disciplinary Chamber (IDSN), to the Labour Chamber of the Supreme Court (IPiUS). M.F. requested the Labour Chamber to rule that judge J.M. does not have an employment relationship with the Supreme Court, justifying her claim with the irregularities involved in judge J.M.’s appointment. Prior to the plaintiff’s bringing the case, disciplinary proceedings had been instituted against her, and the defendant judge was to appoint the panel of judges to try her case. The plaintiff based her case on Article 189 of the Polish Code of Civil Procedure, which allows anyone to bring an action for determination of the existence or non-existence of a legal relationship or a right, provided that the claimant has a ‘legal interest’ in such a determination. The IPiUS submitted a preliminary reference to the ECJ, asking whether Articles 19(1), 2, 4(3) and 6(3) TEU, in conjunction with Article 47 CFR and Article 267 TFEU should be interpreted as requiring that it declare that a person whose judicial appointment process was subject to a flaw, namely that ‘the document of [judicial] appointment was issued on the basis of provisions which infringe the principle of effective judicial protection or under a procedure which is incompatible with that principle, in the case where a judicial review of these matters prior to the delivery of the document of appointment has intentionally been made impossible’, and the ‘document of [judicial] appointment was issued on the basis of provisions which infringe the principle of effective judicial protection or under a procedure which is incompatible with that principle, in the case where a judicial review of these matters prior to the delivery of the document of appointment has intentionally been made impossible’. In its judgment, the ECJ noted that Polish ‘national law does not authorise, and has never authorised, all subjects of the law to challenge the appointment of judges by means of a direct
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ECJ 29.3.2022, C-132/20, Getin Noble Bank

A judge, appointed to the Civil Chamber of the Supreme Court by the reformed KRS, submitted a reference asking the ECJ to answer whether judges appointed by the Council of State during the socialist era, as well as judges appointed by the KRS between 1989 and 2018, could guarantee their independence and impartiality as required by EU law. The reference described the Council of State as ‘a political body within the executive branch of a State characterised by a totalitarian, undemocratic and communist system of power’. Similarly, the reference described the procedures applied between 1989-2018 by the KRS as ‘not fulfil[ling] the criteria of open and transparent rules’, drawing attention to a judgment of the Polish Constitutional Court that declared some provisions of the KRS Act unconstitutional.

The Polish Ombudsman intervened in the case, requesting the ECJ to dismiss the request as inadmissible because the referring court did not fulfil the criteria of independence, impartiality and establishment by law, given the circumstances of the judge’s appointment. The ECJ decided nonetheless to accept the reference, pointing out that the standards of judicial independence applicable with regard to admissibility of references under Article 267 TFEU must be distinguished from the standards of independence for the purposes of asserting whether the right to a fair trial (Article 47 CFR) and effective judicial remedy (Article 19 TEU) are at stake.

On the merits of the reference, the ECJ ruled that the fact that a judge was appointed ‘by a body of an undemocratic regime ... is not capable per se of giving rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge or, consequently, of calling into question the status as an independent and impartial tribunal previously established by law of a court formation which includes that judge’. As regards the statement about judges having been appointed by the pre-2018 KRS in a procedure lacking transparency, openness and judicial remedies, the ECJ remarked that if the body was properly (i.e. legally) composed, but the procedure ‘was neither transparent nor public nor open to challenge before the courts’, then – ‘provided that such irregularities are not of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process’ – the judges thus appointed could still be considered independent and impartial.

ECJ 13.10.2022, C-698/20, Gmina Wieliszew

A three-judge panel of the Civil Chamber of the Polish Supreme Court (SN), composed of judges appointed after 2018, submitted a preliminary reference on bankruptcy law. The Polish Ombudsman (RPO) intervened, claiming that the panel having submitted the reference was not a court or tribunal within the meaning of Article 267 TFEU, specifically because the judges sitting on it were not ‘established by law’, given the alleged irregularities of their appointment. Responding to these objections, the ECJ reiterated in its judgment that, for the purposes of Article 267 TFEU, what counts is whether the body having brought the reference was established by law. In the case at hand, it was the SN as such, and it fulfilled those criteria. This presumption may be rebutted only if ‘a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge or judges constituting the referring court are not an independent and impartial tribunal previously established by law’. The ECJ claimed that neither at the close of the written part of the procedure nor at the deliberation was it made aware of any such final judgment. The RPO published a press release, explaining that a relevant ECtHR judgment (Advance Pharma) was handed down too late to be brought to the ECJ’s attention. However, according to the RPO, the ECJ should have taken notice of that judgment ex officio.
ECJ 13.10.2022, C-355/21, Perfumesco

A three-judge panel of the Civil Chamber of the Polish Supreme Court (SN), composed of judges appointed after 2018, brought a reference on EU intellectual property law. The Polish Ombudsman intervened, claiming that the reference was inadmissible as it came from a body that was neither established by law, nor independent or impartial. Responding to this objection, the ECJ found that the SN as such was independent, impartial and established by law, which creates a presumption of admissibility of a reference originating from that body. This presumption may be rebutted only by a final judicial decision of a national or international court or tribunal to the effect that the judge(s) in question do(es) not fulfil those requirements.

ECJ 22.12.2022, C-491/20 et al., W.Ż. v A.S. (Sąd Najwyższy)

A number of ordinary judges, facing disciplinary and other proceedings before the two new SN chambers, brought cases to the SN Labour Chamber (IPiUS) asking it to rule on the non-existence of an employment relationship between the judges of the new chambers, who were to decide on cases in which the applicants were involved, on one hand, and the SN, on the other. In reality, the plaintiffs sought to achieve the recusal of the defendant SN judges in other proceedings that concerned them. Failing short of questioning the validity of the acts of judicial appointment of the defendant judges (which, as the NSA had ruled, are not amenable to judicial review), the plaintiffs sought to prove that defendants, appointed to the two new chambers of the SN, cannot effectively exercise judicial office. The IPiUS asked the ECJ whether EU law requires it to authorise the creation of an actio popularis to question the validity of irregular judicial appointments. In its order dismissing the reference, the ECJ drew attention inter alia to the fact that the cases initiated before the IPiUS actually pertained to pending proceedings in which the plaintiffs were defendants. Whilst refusing to create a new remedy, the ECJ pointed out that the plaintiffs should raise pleas based on EU law, more specifically on the direct effect of Article 19 TEU, in those proceedings in which they are defendants, putting forward arguments about the lack of impartiality, independence and establishment by law with regard to the defendant SN judges, rather than attempting to achieve the desired result by challenging the existence of an employment relationship of the defendant SN judges.

ECJ 5.6.2023, C-204/21, Commission v Poland (IV)

In the fourth case brought by the Commission against Poland over respect for the rule of law, the ECJ ruled on various aspects of judicial reforms undertaken since 2018. Firstly, it addressed the jurisdiction of two new chambers of the SN, namely the Disciplinary Chamber (IDSN) (2018-2022) and the Extraordinary Review Chamber (IKNiSP). Concerning the IDSN, which until 2022 had jurisdiction to hear disciplinary cases of judges and decide on lifting their immunity, the ECJ found that its independence and impartiality were not guaranteed, and therefore by conferring jurisdiction upon it, Poland violated Article 19 TEU. Concerning the IKNiSP, the Court did not explicitly state that it was not independent and impartial, but nonetheless found that by granting it exclusive jurisdiction to examine complaints and questions of law concerning the lack of independence of a court or a judge, Poland violated Article 19 TEU in conjunction with Article 47 CFR, Article 267 TFEU and the principle of the primacy of EU law. Secondly, the ECJ ruled on a number of reforms to the law on the judiciary introduced in 2019. It found that making it a disciplinary offence for judges to examine compliance with EU standards relating to an independent and impartial tribunal previously established by law, and specifically prohibiting any national court from making such an examination, violates Article 19 TEU in conjunction with Article 47 CFR and Article 267 TFEU. The ECJ also found that the introduction of a requirement for judges to declare membership in associations, foundations and political parties prior to 1989 violates Articles 7 and 8 CFR as well as the GDPR.
Recent ECJ case-law on judicial independence

ECJ (GC) 24.7.2023, C-107/23 PPU, Lin

A Romanian court of appeal, seized with an appeal in a criminal case, decided to stay proceedings and submit a preliminary reference on the compatibility with EU law of a national rule requiring judges, under pain of disciplinary responsibility, to follow the case law of the Romanian Constitutional Court and Supreme Court, without any exception. In the case at hand, following this case law would have had the effect that the defendants, accused of fraud affecting the financial interests of the EU, would have had their cases time-barred, which the ECJ had considered incompatible with EU law on previous occasions. In its judgment, the ECJ ruled that the principle of primacy of EU law precludes national legislation or practice that makes constitutional court and supreme court decisions binding on ordinary judges under pain of disciplinary responsibility to the extent that such binding force prevents them from being able to ‘disapply of their own motion the case law resulting from those decisions, even if they consider, in the light of a judgment of the [ECJ], that that case law is contrary to provisions of EU law having direct effect’.

ECJ 7.9.2023, C-216/21, Romanian Judges (II)

A judicial association challenged before a Romanian court a set of new rules on judicial promotions enacted by the Supreme Magistracy Council. The new rules envisage that a judge seeking promotion to a higher court be assessed by a board composed of the president of the court of appeal and four judges of that court, who are to take into account inter alia the candidate’s competences in legal reasoning and drafting and respect for deadlines. In the proceedings before the national court, the applicants claimed that the new procedure relies on discretionary and subjective assessments and that, by conferring greater powers on the presidents of the courts of appeal, it has the effect of nurturing hierarchical subordination to the members of the higher courts who are called upon to assess the work of judges applying for promotion. As a result, judicial independence would be impaired. It its judgment, the ECJ stated upfront that rules on judicial promotions must comply with EU standards on judicial independence. However, EU law does not preclude a scheme of judicial promotion based on assessment by a board composed of judges of a higher court to which the applicant seeks promotion, ‘provided that the substantive conditions and procedural rules governing the adoption of decisions relating to effective promotion are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been promoted’.

Concluding remarks

The ECJ’s approach to judicial independence as a binding standard of EU law is based on a social perception test, whereby the impartiality and independence of judges and courts must be assessed from the point of view of the citizens, who must not have the impression (i.e. a subjective feeling) that there are factors, such as appointment procedures, disciplinary responsibility or the possibility of termination of a judicial secondment to a higher court, that affect the imperviousness of judges, especially vis-à-vis the executive and the legislative branches. Under the social perception standard, not only formal legal requirements matter but also the way they are actually used (e.g. A.K. and SN follow-up; Commission v Poland III and IV, for judicial secondments see PR w Mińsku Mazowieckim). Following the same logic, if a new judicial body is established and the circumstances linked to its creation create the impression that it will not be independent, then its establishment will be considered a breach of EU law (Commission v Poland III and IV).

The ECJ also puts an emphasis on individual judges’ self-perceived independence – for instance, a judge fearing that their secondment to a higher court might be terminated at any time by the minister of justice, at the minister’s will, is prone to developing the idea that they need, in their judicial office, to act in such a manner as to live up to the minister’s (presumed) expectations (PR w Mińsku Mazowieckim).
With reference to Article 47 CFR and Article 6(1) ECHR, which require that courts or tribunals be not only independent and impartial but also 'established by law', the ECJ has been reluctant to scrutinise whether domestic provisions on judicial appointments are being followed correctly. Rather, it inquires whether any irregularities could have affected the social perception of independence and impartiality; ultimately, the decision as to the validity of judicial appointments is left to the national courts, on the basis of national law (A.B. and NSA follow-up; M.F. v J.M.; W.Ż. v A.S.). The ECJ has also extended the principle of non-regression to the area of judicial independence, requiring that Member States may not fall below the minimum standards of judicial independence that existed at the time of a given Member State's EU accession (Repubblika; Romanian Judges I). On the subject of disciplinary responsibility of judges, the ECJ has ruled both on procedural aspects, underlining that judges must have guarantees of a fair trial and rights of the defence (Romanian Judges I, W.Ż. v KRS, PR w Mińsku Mazowieckim), and on the definition of disciplinary offences, which may not deter judges from applying EU law (Commission v Poland IV).

As regards remedies available to national judges faced with measures incompatible with EU law, the ECJ insists on the primacy and direct effect of the relevant EU rules, urging national judges to disapply non-conforming national law. However, it is not asking national judges to create new remedies, hitherto unknown in EU- or national law, such as an actio popularis to challenge irregular judicial appointments (M.F. v J.M.; W.Ż. v A.S.). With respect to the admissibility of preliminary references, the ECJ only analyses whether the judicial body (court or tribunal) as such fulfils EU standards, and presumes that judges sitting on such a body are independent, impartial and lawfully established. This presumption may be rebutted only by a final judgment of a national or international court, brought to the ECJ’s attention (Getin Noble; Wieliszew; Perfumesco). Systemic rule of law deficiencies, even if established in due procedures, do not undermine per se the duty to comply with a European arrest warrant – the requested court must verify in concreto whether the suspect’s fundamental rights would actually be violated if they were surrendered (Minister of Justice and Equality; L and P).

MAIN REFERENCES


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