

The grey zones of the judicial independence

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Agenda

- I. The notion of independence.
- II. Independence versus other aspects: transparency and proportionality.
- III. Independence standards in the context of Article 267 TFEU vs. the need to ensure uniform interpretation of EU law.
- IV. Independence of the judiciary in the context of protecting the EU budget - Regulation 2020/2092.
- V. Who can examine and challenge a judge's independence?
- VI. Can we already talk about the judge's subjective right to independence?
- VII. Does a judge have a duty to defend independence?

I.1. The notion of independence

The concept of independence means, among other things, that the body in question performs its judicial tasks fully autonomously, without being subject to any official hierarchy or subordination to anyone and without receiving orders or directives from any source, and that it is thus protected from outside interference and pressure (C-64/16, *Associação Sindical dos Juízes Portugueses*).

I.1. The notion of independence

Moreover, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive (C-585, 624 and 625/18, A.K.).

It is important that judges be protected from outside interference or pressure - this includes more indirect forms of influence that can weigh on the decisions of the judges in question (C-487/19, W.Ż.).

I.2. The principle of procedural autonomy

While the distribution or reorganisation of court jurisdiction in a MS comes, in principle, under the freedom of the MS guaranteed by Article 4(2) TEU (C-51/15, *Remondis*), that distribution or reorganisation must not undermine respect for the rule of law set out in Article 2 TEU and the requirements arising from Article 19(1) TEU, including those relating to independence, impartiality and the previous establishing by law of the courts and tribunals called up to interpret and apply EU law (C-204/21, *Commission v Poland*).

I.3. Rules for appointing judges

- The right to be judged by a tribunal „established by law” encompasses, by its very nature, the judicial appointment procedure (C-562/21 and C-563/21, X,Y).
- As regards appointment decisions, it is necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed (C-562/21 and C-563/21, X,Y).

I.3. Rules for appointing judges

An irregularity committed during the appointment of judges entails a breach, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the MS, in particular the executive, could undermine the integrity of the outcome of the appointment procedure and thus give rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge or judges concerned (C-487/19 W.Z.).

I.4. Seconded judges

- Member States may have recourse to a system according to which judges may, in the interests of the service, be temporarily seconded from one court to another (C-748/19 and C-754/19 *WB*).
- Compliance with the requirement of independence means that the rules governing the secondment of judges must provide the necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions (C-748/19 and C-754/19 *WB*).

I.5. Disciplinary responsibility of judges

The rules governing the disciplinary regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. In that regard, rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, rules which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, especially the rights of the defence, and rules which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary (C-204/21 *Commission v Poland*).

II. Independence versus other aspects: transparency and proportionality.

1. Do judges' asset declarations have to be disclosed to the public?
2. Does making other information public, such as membership in associations and foundations, limit independence?
3. What should the allocation of cases look like?
4. What should be the scope of a judge's immunity?
5. Can the executive or legislative branch determine the obligation to issue a certain number of sentences per year?

III. Independence standards in the context of Article 267 TFEU vs. the need to ensure uniform interpretation of EU law.

In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies those requirements, irrespective of its actual composition. The presumption may be rebutted where a final judicial decision handed down by a court or tribunal of a MS or an international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of Article 19(1) TEU, read in the light of Article 47 of the Charter (C-718/21 L.G.).

IV. Independence of the judiciary in the context of protecting the EU budget - Regulation 2020/2092.

- Sound financial management can only be ensured by Member States if arbitrary or unlawful decisions of public authorities can be subject to effective judicial review by independent courts (Recital 8).
- Conditions for the independence of the courts (Recital 10).
- The independence and impartiality of the judiciary are essential in order to ensure the sound financial management particularly with regard to the judicial enforcement of legal claims (C-157/21, *Republic of Poland v European Parliament and Council*)

V. Who can examine and challenge a judge's independence?

1. Parties to the proceedings.
2. Judges:
 - whether only in review of the ruling?
 - or on the plea of a party?
 - can a judge refrain from adjudicating with another judge whose independence he/she questions?
 - can a judge himself refrain from ruling if his/her independence is questioned?
1. Courts of other EU MS under the procedure for recognition of judgments.

V. The right to examine the independence of the court and the correctness of the appointment of the judge

A national court must be able, in certain circumstances, to ascertain whether an irregularity vitiating the procedure for the appointment of a judge could have led to an infringement of that fundamental right (C-487/19, *W.Ż.*).

V. The right to examine the independence of the court and the correctness of the appointment of the judge

By adopting and maintaining in force national law, prohibiting any national court from verifying compliance with the requirements stemming from EU law relating to the guarantee of an independent and impartial tribunal previously established by law, the MS had failed to fulfil its obligations under Article 19(1) TEU, read in conjunction with Article 47 of the Charter (C-615/20 and C-671/20, *YP and Others*).

V. Mutual trust and independence

Where a EAW is issued by a MS with a view to the surrender of a requested person for the purposes of conducting a criminal prosecution (..) the EJA must, in order to assess specifically and precisely whether in the particular circumstances of the case there are substantial grounds for believing that following that surrender that person will run a real risk of breach of his or her fundamental right to a fair trial, examine in particular to what extent the systemic or generalised deficiencies so far as concerns the independence of the issuing MS's judiciary are liable to have an impact at the level of that MS's courts with jurisdiction over the proceedings to which that person will be subject (C-354/20 PPU and C-412/20 PPU, *L,P*)

VI. Can we already talk about the judge's subjective right to independence?

The Court considers that Baka had been able to prove the cause and effect relationship between the exercise of his right to freedom of expression and his dismissal as president. His removal constituted a violation of Article 10 of ECHR and was a violation of Article 6, since the principle of judicial irremovability was essential to maintaining of judicial independence (*Baka v. Hungary*, 20261/12).

VI. Can we already talk about the judge's subjective right to independence?

The Court affirmed that Article 6 of the ECHR applies to disputes over the employment of judges, removal of judges, suspension from judicial office or disciplinary dismissal (*Broda, Bojara v. Poland*, 26691/18, 27367/18, *Żurek v. Poland*, 39650/18, *Grzęda v. Poland*, 43572/18)



VI. Can we already talk about the judge's subjective right to independence?

*C-558/18 and C-563/18, Miasto Łowicz and Prokurator Generalny
T-530/22 –T-533/22, International Association of Judges and others*



VII. Does a judge have a duty to defend independence?

Thank you!

