Maastricht University

TRIIAL Casebook

TRIIAL - TRust, Independence, Impartiality and Accountability of judges and arbitrators safeguarding the rule of Law under the EU Charter

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Table of Abbreviations

Alternative Dispute Resolution	ADR
Area of Freedom, Security and Justice	AFSJ
Charter of Fundamental Rights of the European Union	CFR
Common European Asylum System	CEAS
Court of Justice of the European Union	CJEU
European Convention on Human Rights	ECHR
European Court of Human Rights	ECtHR
European Arrest Warrant	EAW
European Union	EU
Member State/Member States	MS/MSs
Online Dispute Resolution	ODR
Treaty on the European Union	TEU
Treaty on the Functioning of the European Union	TFEU
TRust, Independence, Impartiality and Accountability of judges and arbitrators safeguarding the rule of Law under the EU Charter	TRIIAL

Introduction – The European Union Standard of Judicial Independence as a Tool for Practitioners

This Casebook is one of the deliverables of the European Commission's funded project TRIIAL - TRust, Independence, Impartiality and Accountability of judges and arbitrators safeguarding the rule of Law under the EU Charter. It presents a selection of case law from almost 200 cases collected by beneficiaries involved in the project; cases that were identified in the course of discussions between judges and legal practitioners that participated in the TRIIAL events and through desk research on the evolution of the standard of judicial independence, impartiality, and accountability on the European continent and, specifically, within the context of the European Union.[1] The attempt was to illustrate both the activities of pan-European courts[2] engaged in addressing systemic pan-European questions and problems occurring on a more local scale within specific EU jurisdictions.

It is, in fact, within the legal system of the European Union that evolutionary and, arguably, revolutionary developments took place, allowing all of its Member States (and other states parties to ECHR) to revisit the rules behind the fulfilment of the mandate of judges, wielders of the judicial power in Western democracies. Such developments offered a new perspective on the use of the European Union based judicial interaction techniques[3] as tools for the assessment and improvement of the systemic arrangements providing for the position of a judge and the ability to fulfil her function both within a given legal system and in cross-border situations.

In this Introductory section we present the Rationale of this Casebook and information about its Structure and potential use.

Rationale of the casebook: beyond the 2010s-2020s rule of law crisis

The discussion of the position of judges in the legal system in the European Union has emerged against the background of the rule of law crisis that has been plaguing the European Union for

[1] The TRIIAL collected jurisprudence available in the CJC Database: https://cjc.eui.eu/data/

[2] See, for instance, among other publications by the same authors, the casebook focusing on the case law of CJEU: Laurent Pech & Dimitry Kochenov, Dimitry and Kochenov, Dimitry, Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case (May 20, 2021) SIEPS, Stockholm, 2021-3<https://ssrn.com/abstract=3850308> accessed on 21 July 2021.

[3] As explored in the earlier projects of Centre of Judicial Cooperation Judcoop & Actiones I. For a definition of the concept, see Federica Casarosa and Madalina Moraru (eds), *The Practice of Judicial Interaction in the Field of Fundamental Rights - The Added Value of the Charter of Fundamental Rights of the EU* (Edward Elgar 2022).

the past decade.[4] With time, it has proven obvious that it is essential to employ all available legal and political tools to safeguard effective judicial protection across the European Union Member States. The 'reforms' conducted in some Member States (originally in Hungary and Poland, but with time also in Malta, Romania, Spain and others) have also put in the spotlight both the conception of 'effective judicial protection' or 'fair trial' guaranteed, among others by a function of an independent, impartial and accountable judge. As a consequence, two parallel developments could be observed in the pan-European legal system.

On the one hand, we can observe the reactionary mobilization of legal and political front involving the judiciary and lawyers both on the national and European Union levels using the instruments available in the European Union toolbox.

First, the EU institutions started to engage in a debate with states whose standard departed from the one ensured at the time of accession to the EU. Arguably, when making this step, the EU institutions finally breached the rift between the attention granted to the EU values in external and internal matters and made use of the existing tools, employment of which had seemed too risky before 2015. And so, the ensuing steps proved that, indeed, Art. 7 TEU could serve as the basis for suspension of voting rights in the Council, infringement procedures could be instigated on the basis of the violation of Union values,[5] and the disbursement of the European Union funds could be made conditional on the adherence to EU standard of rule of law protection.[6] At the Council of Europe level we did not only see the unprecedent activity of its advisory bodies, but also a bold decision of the President of the European Court of Human Rights choosing to prioritize the most pertinent fair trial and judicial independence related cases over the chronologically ordered applications.[7]

At the national level, the discussion about the state of the judiciary and justice systems took on more of a public guise as could be observed in the context of the constitutional court debates

[4] See, for example: L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.
[5] See infringement procedures instigated against Poland in relation to rule of law crisis, and changes to the organisation of courts and the judiciary specifically.
[6] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ 2020 L 433, 1–10.
[7] Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', <https://www.journals.vu.lt/teise/article/view/24277/23553> accessed 20 July 2021.

in the Netherlands[8] or the possibility to reform the functioning of the Spanish Council of the Judiciary.[9]

All these developments have proven that the European Union has a capacity of acting in an internally coherent manner, even if the political will is sometimes still lacking.

On the other hand, through the increased interactions between judges and enhanced judicial dialogue within the European legal space, not only the value of the rule of law gained on salience and conceptual maturity,[10] but above all the standard of judicial independence started to take on a more concrete shape and to give more flesh to the framework guidance offered by Council of Europe, OSCE[11] and other documents[12]. This was largely thanks to the enhanced activity of courts and judges that offered more occasions to the pan-European courts to make the conditions pertaining to the organization of work and the position of judges clearer. Credit is due to the CJEU specifically, which decided to interpret Art. 19 TEU in such a manner as to determine the position of the EU vis-à-vis its Member States in terms of, both, the role of the European Union in outlining the contours of this standard, and the content of the Member States obligations viewed from the perspective of the duty of sincere cooperation.

In other words, the result of the rule of law crisis seems to have become the opportunity to reinforce the substantive and procedural footing for the values and related mechanisms in the European legal space. In the same spirit, this casebook offers a far-sighted perspective viewing judicial interactions as an essential element of the process of gradual improvement of justice systems in going thus beyond the immediate reaction to the rule of law crisis, which, inevitably (hopefully soon) will come to an end.

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[8] Library of Congress, 'Netherlands: Judicial Reforms Proposed to Improve Access to Legal System' <https://www.loc.gov/item/global-legal-monitor/2009-08-05/netherlands-judicial-reforms-proposed-to-improve-access-to-legal-system/> accessed 21 July 2021.

[9] See: Ley 3/2020, de 18 de septiembre, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia, <https://www.boe.es/buscar/act.php?id=BOE-A-2020-10923> accessed 21 July 2021.

[10] Council of Europe, 'Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies' <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805afb78> accessed 22 July 2021.

[11] OSCE, 'Legal Digest of International Fair Trial Rights' (26 September 2012) <https://www.osce.org/odihr/94214> accessed 29 June 2022.

[12] The Judicial Group on Strengthening Judicial Integrity, 'Bangalore Principles of Judicial Conduct' (2001) <https://www.icj.org/wp-content/uploads/2015/08/JIG-Measures-effective-implementation-Bangalore-Principles-2010.pdf> accessed 29 June 2022.

About the Structure of the Casebook

Since the main purpose of this Casebook is to both offer the contextualised training materials to trainers and to judges willing to engage in self-study, different parts of this Casebook are designed to assist in the process. In Part I the abstract standard of judicial independence is presented as it emerges in the case law of the European Courts.[13] As such, this part functions on its own and its content are echoed in the subsequent Part II. There, we offer a more in-depth presentation of the generalised jurisprudential trends with a selection of case notes illustrative of more interesting phenomena visible in the case law. This part can be complemented with the reading of case notes from other jurisdictions as made available in CJC TRIIAL Database. The Final Part III exemplifies Hypotheticals – scenarios to be used in the training sessions anchored in the issues presented in Part II.

Part I (Judicial Independence in Europe: Trust, Independence, Impartiality and Accountability) presents an analysis reflective of how the courts engaged with the topic, thus accounting for a fragmented picture that is being filled out as we speak. Thus, the ECtHR both responds to the problems flagged by individual applicants, at the same time deferring to the legal system at hand to conduct its own balancing exercise. The approach of the CJEU, on the other hand is somewhat historical and truly evolutionary reflective of the status of the European Union at the time of adjudication. The section is organised around the specific provisions of European treaties that determined the scope and purpose of examination of the CJEU and, thus starts from the basic determination who are the 'courts and tribunals' entering the dialogue with the CJEU through Art. 267 TFEU preliminary reference procedure, and ends with the consideration of the interaction of all the relevant provisions of the treaty with the post-accession conditionality.

Thus Part I represents the state of the European Court made standards of judicial independence, impartiality and accountability as per early March 2022 with the full awareness that the patchwork is still sewn and the standard will need to ripen with time and following up on implementation of the judgements in national legal systems.

Part II offers an analysis of the issues that emerge in case law concerning standards of judicial independence, organised around the main structural themes.

[13] As per early March 2022.

The analysis commences with the closer look at the guarantees of judicial independence and impartiality in a legal system of another Member State viewed as a condition of mutual trust. Whereas the focus rests on the implementation of the European Arrest Warrant across the EU Member States, the reasoning developed by the CJEU echoes across the case law on the topic. Effective judicial protection featured in Art. 19 TEU and manifestation of EU values from Art. 2 TEU are essential for interactions of EU legal systems across borders and jurisdictions. Without effective judicial protection, there is no mutual trust; no mutual trust implies no mutual recognition and an impediment to the functioning of EU legal system. Case study 1 is the natural starting point for the Casebook's analysis given that *LM* case together with *Portuguese Judges* judgement herald the subsequent avalanche of judgements.

From there, the Case Study 2 focuses on a set up particular for the interaction between the law of European Union and ECHR standards. The assessment is focused on identifying participants of effective judicial protection system of the European Union. How to identify a court or a tribunal under Art. 267 TFEU? How does such identification correspond to the idea of a court established by law in the light of Art. 8 ECHR. The classification may have an impact on a individuals adjudicating within such body and the manner in which their position should be framed from the perspective of independence, impartiality and accountability.

Case Study 3 puts under the spotlight judges as active creators of the standard of judicial independence, impartiality and accountability within their own systems. The selected cases make it clear that certain aspects of the standard needs to be spelled out to a larger degree. The focus here is on the protection of the appointment to the office and judicial freedom of expression. In this scenario we also outline the shortcoming of the European Union preliminary reference procedure that forces the judges and individuals concerned to await until the damage is done before the question about the compatibility of a systemic solution affecting them can be asked to the CJEU.[14]

Case Study 4 highlights actors involved in the process of the creation of the standard: these are either judges themselves, or ordinary citizens, which in the system of interacting legal systems have the opportunity to question the set-up of the judicial system. Rarely will the civil society organizations come to the picture.

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[14] See, for instance the manner in which the potentiality of the harm has led to the inadmissibility order in C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny (Miasto Łowicz)*, [2020] EU:C:2020:234.

In the final Case Study 5, we will look beyond the justice system and examine the alternative dispute resolution systems and the independence of arbitrators in a variety of contexts. There, as endorsed by the courts already, the standard applies by analogy, however, the extent of this analogy is unclear in the light of the case law to date.

Part III presents a selection of five Hypotheticals – fictional scenarios illustrating issues at hand. These are matched to the five Case Studies and accompanied with the discussion questions.

Part I. Judicial independence in Europe: Trust, Independence, Impartiality and Accountability

1) Standards of Judicial independence and impartiality according to the European Convention of Human Rights

1. Introduction and Background Observations

In general, the standard of judicial independence, impartiality and accountability emergent from Article 6 of the European Convention of Human Rights is frequently criticised due to its fragmented character. As indicated by the Venice Commission 'the case-law of the Court sheds light on a number of important aspects of judicial independence but, by its very nature, does not approach the issue in a systematic way'.[15] This is perhaps related to the *modus operandi* of the Court's work, whereby it is called upon to evaluate the fulfilment of the obligations in a very specific, application-determined context. Some argue that adoption of such approach indicates a respectful invitation to national courts, not to act as marionettes, but to take the role of interlocutors in the process of standard creation.[16]

On the other hand, however, this approach by the ECtHR can be attributed to a certain caution in evaluation of the judicial system in a given state. This could be seen in, for instance, in Turkish cases. In 2020 *Baş v Turkey* judgement the Court adjudicated on the premise that magistrate courts competent in cases concerning alleged members of the 'Fetullahist Terrorist

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* Authored by Dr. Karolina Podstawa. The author thanks the contributors to the numerous training sessions organised in the framework of TRIIAL project as well as colleagues involved in the project Rebecca Aspetti and Kamila Kaczmarek for their invaluable research support in uncovering the windy paths of judicial independence and impartiality jurisprudence of the two European Courts.

[15] Venice Commission, Report on the Independence of the Judicial System. Part I: The Independence of Judges (adopted at its 82nd Plenary Session, Venice 12-13 March 2020) available at <https://rm.coe.int/1680700a63> accessed 20 November 2021 para 13.

[16] Implementation of the European Convention on Human Rights and of the Judgements of the ECtHR in National Case Law. A comparative analysis Janneke Gerards & Joseph Fleuren Source: <https://www.corteidh.or.cr/tablas/29815-1.pdf> (accessed 12 December 2021). As an example of such an approach, consider *Urban and Urban v Poland* (ECtHR 30 November 2010, appl. no. 23614/08) where ECtHR considered the position of court assessors (a type of trainee judges granted certain independent tasks in adjudication by the Polish legislation), which had been subject of the evaluation of the Polish Constitutional Court that determined that attributing adjudicating tasks to court assessors violated the principle of judicial independence. ECtHR observed that in the constitutional complaint proceedings the Constitutional Court has no jurisdiction to review the compatibility of legislation with international agreements, including the Convention. The important consideration for this Court is that the Constitutional Court found that the manner in which Poland had legislated for the status of assessors was deficient since it lacked the guarantees of independence required under Article 45(1) of the Constitution, guarantees which are substantively identical to those under Article 6(1) of the Convention. It would be justified for the Court to reach a contrary conclusion only if it was satisfied that the national court has misinterpreted or misapplied the Convention provision or the Court's jurisprudence under that provision or reached a conclusion which was manifestly ill-founded.

Organisation/Parallel State Structure (FETÖ/PDY)' (the applicant in the case, Hakan Baş, was accused of belonging to this organisation and on this basis placed in a pre-trial detention by the order of the mentioned magistrate court) fall within the scope of the definition of an 'independent tribunal established by law'.[17] In fact, these specific magistrate courts were established specifically as a tool to quash opponents of the regime, the fact that was not substantiated sufficiently by the applicant's lawyer.

The question is, of course, to what extent is the Strasbourg Court obliged to investigate the structural deficiencies of a given system. For instance, in 2019 *Alparslan Altan v Turkey*,[18] the Court missed the opportunity to assess the position of Turkish Constitutional Court, and specifically, its impartiality.

Even if one was to claim that ECtHR rightly leaves the task of application of its standard to the national bodies, it does not excuse its lack of conceptual coherence and discipline that is visible, among others, in the convergence of the concepts of impartiality and independence or a relatively recent introduction of the notion of internal judicial independence, [19] which further adds to the confusion in the understanding of the variety of elements making up judicial independence.[20] The below section outlines the principal elements of the standard as already developed by the ECtHR, doing so, however, with the view that the Strasbourg Court will continue to render the standard more and more explicit, in part thanks to its altered strategy in the prioritisation of case law.[21]

2. Elements of the ECHR standard of judicial independence, impartiality and accountability

In general, the independence and impartiality of judges in the Convention is a function of independence and impartiality of the judicial system in line with Art. 6 ECHR, whereby the

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[17] *Baş v Turkey* App no 66448/17 (ECtHR, 3 March 2020), paras 271 – 281.

[18] *Alparslan Altan v Turkey* App no 12778/17 (ECtHR, 16 April 2019).

[19] T. Barkhuysen et al., 'Right to a fair trial', in P. van Dijk et al. (eds.), Theory and Practice of the European Court of Human Rights (Intersentia 2018) 599.

[20] Joost Sillen, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights' European Constitutional Law Review <https://www.cambridge.org/core/journals/european-constitutional-law-review/article/concept-of-internal-judicial-independence-in-the-case-law-of-the-european-court-of-human-rights/384E519248A7571C6126628A345C324D> accessed 15 July 2021.

[21] In line with the summary published by the Registry on 17 March 2021, the Court will prioritise the so called Impact cases belonging to the category IV-High, with cases relating to the position of judges in countries afflicted with the rule of law crisis belonging to this category. See: Council of Europe, 'A Court that matters/Une Cour qui compte - A strategy for more targeted and effective case-processing' <https://echr.coe.int/Documents/Court_that_matters_ENG.PDF> accessed 15 November 2021.

notion of a fair trial entails a hearing before 'an independent and impartial tribunal established by law'.[22]

As it seems, the Court views its jurisprudence as distinguishing the two concepts, however, in its pronouncements refrains from interfering with an internal system of the organisation of justice. In the below sections we recount the frame of the standard of judicial independence as outlined by the European Court of Human Rights. In the representation of the standard the structure assumed will follow the Thematic Factsheet on Independence and Impartiality of the Judicial System.[23]

However, it must be emphasized that the ECtHR case law, when assessing whether a judicial body can be labelled as an 'independent' focuses, mainly, on four distinct formal conditions of independence that affect the abstract notions of independence and impartiality:

- The manner of appointment of the judicial members;
- The duration of the term of the judicial office;
- The existence of certain guarantees against outside pressures;
- Whether the body presents an appearance of independence.[24]

3. Independence of the judicial system

An independent tribunal is considered as such, if it is not subdued to the will of the other branches of the government (the executive and the legislative) and that of the parties. In addition, it is not to be subjected to pressures that result from the hierarchical organisation of the system of justice. The final element of the standard is known as internal judicial independence.

In the section below we will offer the summary of the case law dealing with these different aspects both from the perspective of the conceptual demarcation and its practical implications.

[22] Applicable under Art. 6 to the criminal and civil proceedings, however, the holistic approach, as argued by Teleki in the context of *Savino and Others v Italy*, indicates that administrative justice system falls within the scope of application of the standard of judicial independece. See: Teleki, C. (2021). 'Chapter 8 The Case-law of the ECtHR on the Right to an Independent and Impartial Tribunal'. In *Due Process and Fair Trial in EU Competition Law*. Leiden, The Netherlands: Brill | Nijhoff. doi: https://doi.org/10.1163/9789004447493_012.
[23] Department for the execution of judgments of the European Court of Human Rights, 'Independence and impartiality of the judicial system' <https://rm.coe.int/thematic-factsheet-independence-impartiality-eng/1680a09c19> accessed on 20 January 2022.
[24] *Parlov-Tkalčić v Croatia* App no 24810/06 (ECtHR, 22 December 2009).

Independence from the Executive and the Legislature

The first set of judgements, growing in volume, speaks on the relationship between the judiciary with other branches of the government. After all, potentially both the legislature and the executive may have a direct impact on the organisation and functioning of the judiciary.

A number of issues emerged in this context.

The existing case law has, firstly, dealt quite extensively with special type of courts established within a variety of contexts.

In the French system, the ECtHR reviewed the practice of the Council of State to refer the unclear wording of international treaties for the interpretation of the Minister of Foreign Affairs. As of *Beaumartin v France* judgement, this task is performed by the Council of State itself.[25]

The Court was called upon to determine the status of military and state security courts, the evolution that found its reflection in their gradual abolition[26] or a swift amendment of procedure resulting in reinstating the feature of independence to these bodies.[27]

The second set of case law concerned various types of tribunals. In *Stafford v UK*[28] the Court considered the position of the Parole Board, a body, which, since 2003, makes final decisions on the possibility of release life sentenced prisoners. Prior to 2003 such decisions could have been altered by the Secretary of State. In *Brudnicka and others v Poland*[29] under assessment was the position of Maritime Dispute Chambers. In *Maktouf and Damjanović v Bosnia and Herzegovina*[30], the Court pronounced itself on the status of international judges in the State Court. Their appointment was motivated by a desire to reinforce the independence of the State

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[25] *Beaumartin v France* App no 15287/89 (ECtHR, 24 November 1994).

[26] See, in particular, in the Turkish context: *Bayrak v Turkey* App no 39429/98 (ECtHR, 3 May 2007), *Ibrahim Gurkan v Turkey* App no 10987/10 (ECtHR, 3 July 2012) and *Tanisma v Turkey* App no 32219/05 (ECtHR, 17 November 2015) as well as in the context of the abolition of State Security Courts, *Ciraklar v Turkey* App no 19601/92 (ECtHR, 28 October 1998).

[27] See, concerning the position of civilian judge-advocate on courts-martial *Findlay v UK* App No 22107/93 (ECtHR, 25 February 1997), which was followed by the introduction of the obligation to review a decision taken with a participation of the judge-advocate in the course of appeal procedure by a Courts-Martial Appeal Court composed in its entirety of judges. The parallel development took place across the three branches of the military as the result of *Grieves v UK* App No 57067/00 (ECtHR, 16 December 2003).

[28] *Stafford v the United Kingdom* App no 46295/99 (ECtHR, 28 May 2002).

[29] *Brudnicka and Others v Poland* App no 54723/00 (ECtHR, 3 March 2005).

[30] *Maktouf and Damjanović v Bosnia and Herzegovina* App nos. 2312/08 and 34179/08 (ECtHR, 18 July 2013).

Court's war crimes chambers and to restore public confidence in the judicial system. That the judges in question were seconded from among professional judges in their respective countries represented an additional guarantee against outside pressure.

In the very recent *XeroFlor Sp. Z o. o. v Poland*[31] the Court considered the position of the Polish Constitutional Court in the light of the recent reforms affecting both the terms of office of judges appointed to the Court, their appointment, and the manner in which the Court exercises its functions at the moment.

Similarly, the Court developed a doctrine allowing for the involvement of judicial assistants in some of judicial activities, provided that they are equipped with judicial independence guarantees analogous to those of judges, as per *Luka v Romania.*[32]

Importantly, the obligation to ensure independence of tribunals binds also other branches of the government, both in terms of the manner in which the organisation of the judiciary as well as involvement in the procedure in its various stages.[33] On the other hand, the Courts should themselves make an effort in ensuring their jurisdiction vis-à-vis evaluations made by executive, in particular administrative authorities.[34]

The ECtHR also addressed the possible intervention of the legislature on the judges. This was, for instance, the case evaluated in *Zielinski, Pradal, Gonzales and others v France*[35] In this case it was decided that France violated the Convention by altering the law retroactively in such a manner as to influence the judicial determination of the dispute.[36] However, it would be possible for the state to intervene had this been justified by compelling grounds of general interest.[37] In case at hand, such justification could not be attributed to the conflict in case law before two courts (the Colmar and Besançon Courts of Appeal). However, the Court admitted that there can be very cogent reasons for accepting such an intervention where, in certain temporal and geographical circumstances, the conflicting decisions in practice lead to a denial

[31] *XeroFlor w Polsce Sp. z o. o. v Poland* App no 4907/18 (ECtHR, 7 May 2021).
[32] *Luka v Romania* App No 34197/02 (ECtHR, 21 July 2009).
[33] See, to the effect*: Agrokompleks v Ukraine* App no 23465/03 (ECtHR, 25 July 2013).
[34] *Terra Woningen B.V. v. the Netherlands* App no 20641/92 (ECtHR, 17 December 1996).
[35] *Zielinski, Pradal, Gonzales and others v France* Joined app nos. 24846/94 and 34165/96 to 34173/96 (ECtHR, 28 October 1999 (GC)).
[36] To the same effect, see: *Stran Greek Refineries and Stratis Andreadis v Greece* App no *13427/87* (ECtHR, 9 December 1994) and *Papageorgiou v Greece* App no 59506/00 (ECtHR, 22 October 1997).
[37] *As in National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v the United Kingdom* App no 117/1996/736/933-935 (ECtHR, 23 October 1997).

of justice, for example where the execution of irreconcilable decisions is physically impossible or, if not impossible, would immediately create an intolerable inequality of position between the parties concerned.

The most recent judgement establishing the far-reaching test for the determination of the sufficient quality of the judicial system vis-à-vis other branches of the government is the Grand Chamber judgement in *Guðmundur Andri Ástráðsson v Iceland*.[38]

The case addresses the appointment of judges, and the way this affects the status of a court as a 'tribunal established by law' in the meaning of Article 6(1) ECHR. Participation of judge whose appointment was vitiated by undue executive discretion without effective domestic court review and redress.

The task of the Grand Chamber was limited to determining the consequences of the breaches of domestic law, notably whether Judge A.E.'s participation had deprived the applicant of the right to be tried by a 'tribunal established by law'. The case provided the ECtHR with an opportunity to refine and clarify the meaning to be given to the concept of a 'tribunal established by law', notably by considering how its individual components should be interpreted so as to best reflect its purpose and to ensure that the protection it offers is truly effective. The Grand Chamber also analysed its relationship with the other 'institutional requirements' (those of independence and impartiality).

The applicant complained to the ECtHR that his criminal conviction had been upheld by a 'tribunal' which was not 'established by law' and which was not independent and impartial, in violation of Article 6(1) of the Convention. In order to do the necessary balancing, the court introduced three criteria that, taken cumulatively, should provide a solid basis to guide the Court – and ultimately the national courts – in the assessment as to whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, and whether the balance between the competing principles has been struck fairly and proportionately by the relevant State authorities in the particular circumstances of a case.

[38] *Guðmundur Andri Ástráðsson v Iceland* [GC] App no 26374/18 (ECHR, 1 December 2020).

It did, however, seize the opportunity to clarify the meaning to be given to the concept of a 'tribunal established by law', and to analyse its relationship with the other 'institutional requirements' under Article 6(1), namely, those of independence and impartiality.

Importantly, as a consequence of the unlawful appointment under Art. 6(1) ECHR, the rulings by judges appointed under irregular circumstances cannot be recognized as rulings by a tribunal established by law, even if there are no indications that the flawed appointment procedure influenced the proceedings or the outcome of the particular case. The implications of this for the recognitions of rulings by Polish courts may be far-reaching and may imply that many rulings by these courts no longer should be recognized by other European courts as decisions by tribunals established by law.

A similar assessment of the effect of national rules on judicial independence, in particular, the manner the executive may impact the judiciary, was carried out by ECtHR in *Bilgen v Turkey.*[39] The Court recalled the special role that the judiciary, as guarantor of justice, plays in a state governed by the rule of law. Given this prominent place, and the growing importance that is being attached to the separation of powers and the necessity of safeguarding the independence of the judiciary, the Court held that it should be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their independence and autonomy (in para 58). Furthermore, the Court regarded several international instruments which all stressed the importance of the right of judges to appeal before an independent authority when a transfer decision had been taken against their will. Against that background, the Court observed that the right of a member of the judiciary to protection against an arbitrary transfer or appointment is supported by international norms as a corollary of judicial independence (in para 63).

The Court considered that it could refer to international norms of judicial independence in interpreting the existence of a right at the domestic level.

The Court then turned to the issue of whether these rights were of a civil nature. In employment disputes concerning civil servants, including judges, the Court has established a two-tier test to decide whether the dispute is civil in nature, the so-called Eskelinen-test. This test dictates that an employment dispute concerning a civil servant is civil in nature, unless two cumulative

[39] *Bilgen v Turkey* App no 1571/07 (ECtHR, 9 March 2021).

conditions are met: 1) a national law must expressly exclude the access to a court for the post or category of staff in question; and 2) this exclusion must be justified on objective grounds in the state's interest.

Thanks to the adoption of a very flexible interpretation of the so-called Eskelinen-criteria, the Court expanded the right of access to a court that domestic judges enjoy under Article 6(1) ECHR. In doing so, this judgment can be seen as marking another step in an evolution that has been going on for a little bit over a decade now.

Similarly, in *Eminağaoğlu v Turkey* (Application no. 76521/12) [40] the ECtHR assessed the disciplinary sanction imposed on an Mr. Eminağaoğlu, the chairman of the organisations of judges (Yarsav) by the Council for Judges and Prosecutors following statements made using media concerning high-profile cases. The ECtHR found the violation and applied *Vilho Eskelinen and Others v Finland* case law.[41] Specifically, the sanction was not subject to judicial review. The lack of appropriate guarantees did not allow for the limitation of the right of freedom of expression under Art. 10 ECHR.

Independence from the parties in a given case

The strand of the case law dealing with the independence from the parties in a given case reflects the general case-by-case approach visible in the area of court's adjudication on Art. 6(1) ECHR. There were numerous cases evaluating the position of a judicial body connected with a party to a case, however, in *Saviano and others v Italy,*[42] the ECtHR has analysed in detail a special position of judicial bodies functioning within the remit of a broader institutional framework. In this specific case, the Court evaluated the position of a Judicial Committee and Bureau for Officials of the Chamber of Deputies and its independence vis-à-vis the Chamber of Deputies, a party in the dispute with employees of the Chamber of Deputies. In this context the ECtHR determined that the mere fact that the members of the two judicial bodies were appointed from among the Deputies would not in itself cast doubt on the independence of these bodies. However, the fact that the administrative body with powers such as that of the Bureau

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[40] *Eminağaoğlu v Turkey* App no 76521/12 (ECtHR, 9 March 2021).
[41] *Vilho Eskelinen and Others v Finland* App no 63235/00 (ECtHR, 19 April 2007).
[42] *Savino and Others - Italy* App Nos 17214/05, 20329/05 and 42113/04 (ECtHR, 28 April 2009).

was the same as the judicial body with competence to rule on any administrative dispute was sufficient to give rise to doubts as to the impartiality of the tribunal thus formed.

In the past, similar evaluation occurred vis-à-vis Social Insurance Appeals Commission,[43] Regional Real Property Transactions Authority,[44] the Rent Review Board[45] or the Housing Benefit Review Board[46]. Each of these bodies functions as a special type of judicial bodies, functioning parallelly to the ordinary courts and, as such, subject to assessment that does not echo the current re-evaluation of the quality of justice systems in the European Union.

Internal judicial independence (and systemic problems of justice system)

This is the most recent of all the elements of judicial independence, developed predominantly in the case law concerning post-Communist countries[47] specifically in 2019 judgement in *Parlov-Tkalčić v Croatia*.[48] The idea of internal judicial independence corresponds to the notion of a natural lawful judge, or a court established by law as indicated in Art. 6 ECHR. It is a notion that refers to the set of guarantees concerning the appointment of judges and courts as well as protection of a function from the demands that may be imposed in a given hierarchical order.

Specifically, in the Court's view, 'judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. This internal judicial independence requires that they be free from directives or pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the (independence and) impartiality of a court may be said to have been objectively justified.'[49]

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[43] *Hartolomei v Austria* App No 17291/90 (ECtHR, 3 February 2005).
[44] *Sramek v Austria* App No 8790/79 (ECtHR, 22 October 1984).
[45] *Langborger v Sweden* App No 11179/84 (ECtHR, 22 June 1989).
[46] *Tsfayo v UK* App No 60860/00 (ECtHR, 14 November 2006).
[47] Joost Sillen, op. cit. (n 21).
[48] *Parlov-Tkalčić v Croatia* (n 25)
[49] In *Parlov-Tkalčić v Croatia* the Court considered that the fears of applicants were objectively justified despite the fact that the position of a Court's President is by law limited to administrative and managerial tasks (n 25).

The series of Ukrainian reforms turned out to be a prolific ground for determination of the notion of internal judicial independence. The 2013 judgement in *Volkov v Ukraine*[50] revealed multiple shortcomings of the organisation of the justice system. Specifically, the Court found the following violations:

(1) the removal from office of a Supreme Court judges due to the alleged 'breach of oath' was conducted in violation of the right to a fair trial. Ukraine was ordered to reinstate the judge to his position,
(2) the composition of the Council of the Judiciary was problematic since only three judges of sixteen making up the panel making decisions were selected by their peers. In addition, the Minister of Justice and the Prosecutor General were ex officio members of the Council.

Similar conclusions the Court reached in 2017 *Kulykov and Others v Ukraine*.[51] In this specific case, the Court considered not only violation of the right to a fair trial, but also to the Art. 8 ECHR right to private life. The Grand Chamber did, however, set out a 'threshold of seriousness' for which applicants must provide evidence in order for there to be a finding of Art. 8 related violation. The Court distinguished between claims arising because of measures taken by the state related to the private life of an individual (a reason-based approach); and the impact that a measure taken by the state will have on an individual's inner circle (including material consequences), opportunities to establish and develop relationships with others, and/or their reputation (a consequence-based approach).

In *Denisov v Ukraine*[52] ECtHR examined the dismissal from the post of a President of Kyiv Administrative Court of Appeal *in absentia* (whilst seeking medical treatment). The applicant challenged the domestic proceedings concerning removal from the position, which in a given case implied the lack of grounding of the judgement in specific findings concerning his particular circumstances. However, the Court did not find the violation in this specific case.

However, the ECtHR referred to its previous case-law in the *Volkov* and *Kulykov*, underlining that the same shortcomings existed in the present case, and demonstrating the systemic nature of the issue during this period (2008-2013). Multiple reforms have already been made to

[50] *Volkov v Ukraine* App no 21722/11(ECtHR, 27 May 2013).
[51] *Kulykov and Others v Ukraine* App Nos 5114/09 (ECtHR, 19 January 2017).
[52] *Denisov v Ukraine* App No 76639/11 (ECtHR, 25 September 2018).

Ukrainian legislation and to the Ukrainian Constitution (in 2016) aimed at ensuring the independence and impartiality of the judicial system and judicial accountability, and to reduce parliamentary and presidential influence on the judiciary.

4. Impartiality in the judicial system

Impartiality implies the perception of the lack of prejudice or bias on the part of judges adjudicating in a given case. The Court in its case law bases its evaluation on application of two tests focusing on objective and subjective elements of impartiality.

Objective impartiality refers to the impression that the organisation of the tribunal leaves as to the sufficient guarantees which exclude any legitimate doubt of impartiality. This test focuses on its composition and organisation of the justice system. In case of evaluation of objective impartiality, it is examined whether the appearance of impartiality is compromised. Similarly, as within the remit of EU case law, the fear of impartiality being compromised is not sufficient. The applicant must demonstrate that the alleged bias can be objectively grounded.

Subjective impartiality, on the other hand, focuses on the personal conviction and behaviour of judges whose image must render an impression of the lack of bias or prejudice. Importantly, subjective impartiality is assumed until proven to the contrary.

The two elements of judicial impartiality are often considered without separation as a given scenario may both contain the shortcomings from the perspective of an external observer (in line with the demands of objective impartiality) and concerning the persona of a judge (as per subjective impartiality).

Objective impartiality

In the ECtHR case law, the issues of objective impartiality have been identified when considering the composition of the bench in systems involving juges d'instruction that may sit on trial benches or vis-a-vis composition of judicial bodies involving individuals that have been subsequently called to fulfil other functions in the government.

In *De Cubber v Belgium*[53] the ECtHR evaluated the position of the same person who acted successively as *juge d' instruction* and as trial judge. The Court considered that the confidential

[53] *De Cubber v Belgium* App no 9186/80 (ECtHR, 14 September 1987).

instruction may indeed lead the accused to the belief that not only the judge will have an impact on the trial, but also that he/she has formed already an opinion which may weigh heavily on the final form of decision. In its case law, the Strasbourg Court emphasised that 'what matters is the scope and nature of these decisions', and the mere fact that they were taken even though giving rise to fears on the part of accused, would not be considered as affecting impartiality of the judge.[54] In some cases, what also matters is the recurrence of the alleged behaviour of judges as in cases concerning the use of detention against political opponents.[55]

As far as the composition of the bench involving future members of the executive, the Court evaluated multiple scenarios.[56] For example, in *Sacilor-Lormines v France*[57] the court evaluated impartiality of the Conseil d'État's composition featuring a future General Secretary of the Ministry of the Economy, Finance and Industry. Importantly, during the proceedings against the applicant company (or even prior to them) the very member was approached about taking this senior position.

Subjective impartiality

The notion of subjective impartiality reflects the position of a singular judge in a given case. In judgements on this area, we see the evaluation of judge's use of his freedom of expression as well as other circumstances of the case which imply that the adjudicator formed views before the case was settled.

In *Olujic v Croatia*[58], the applicant (a former President of the Supreme Court) was a subject of a disciplinary proceedings before the National Judicial Council due to his alleged association with persons from criminal backgrounds. The members of the National Judicial Council expressed their opinions on this association on public TV, thus precluding their impartiality in the case. Similarly, in *Kingsley v the United Kingdom*[59] the Gaming Board evaluating the

[54] As in *Sainte-Marie v France* App No 12981/87 (ECtHR, 16 December 1992). Contrast with *Hauschildt v Denmark* App No 10486/83 (ECtHR, 24 May 1989) where the judge to extend detention must have already a partially confirmed suspicion about the guilt of the accused. In such cases the difference between detention decision and the decision concluding trial is rather tenuous.
[55] See, for example *Aliyev v Azerbaijan* App nos. 68762/14 and 71200/14 (ECtHR, 20 September 2018) and other cases against Azerbaijan to the effect.
[56] See, for example: *Brudnicka and Others v Poland* (n 30); *Maiorano and Others v Italy* App no 28634/06 (ECtHR, 15 December 2009); *Flux v Moldova (No. 6)* App no. 22824/04 (ECtHR, 29 July 2008); *Zolotas v Greece (No. 2)* App no 66610/09 (ECtHR, 29 January 2013).
[57] *Sacilor-Lormines v France* App no 65411/01 (ECtHR, 9 November 2006).
[58] *Olujic v Croatia* App no 22330/05 (ECtHR, 5 February 2009).
[59] *Kingsley v The United Kingdom* App no 35605/97 (ECtHR, 28 May 2002).

performance of a manager of six of 20 licensed casinos clearly acted on the basis of the pre-formed opinion.

5. Note on Fair trial in Arbitration

The applicability of Art. 6(1) ECHR to the field of arbitration and the extent to which this should be done has been subject of the discussion within the arbitration community and also subject of evaluation of the ECtHR in the run up to *Mutu and Pechstein v Switzerland* (See Case Note 9).

In principle, art. 6(1) ECHR must be considered whenever the jurisdiction within which the arbitration procedure takes place considers the ECHR a part of the legal framework (or simply a state is a party to a Convention). On the other hand, the arbitral frameworks do take into account fair trial as a standard applicable to arbitral proceedings. For example, Article 18 of the 1985 Model Law on International Commercial Arbitration provides that '[t]he parties *shall be treated with equality and each party shall be given a full opportunity of presenting his case*.'[60]. This, in a view of arbitral practitioners, overrides both parties' procedural autonomy and procedural discretion of the tribunal. In some cases, keeping fair trial guarantees corresponds to the international public policy and thus not abiding by this standard can constitute a ground for the annulment of an award.[61]

6. ECtHR Case Law in the Context

As we see in this brief account the case law of the ECtHR, the cases that address the abstract notions of judicial independence, in fact, deal with very practical singular issues of organisation of the work of justice system. There is very little systemic reflection present there in order to determine whether a 'tribunal established by law' does indeed possess the characteristics of judicial independence and impartiality. This situation is probably going to gradually change with the slow expansion of the cases reflecting the persistent rule of law issues, be it in Poland or other, non-EU countries parties to ECHR such as Ukraine.

[60] Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Article 18.
[61] See, for instance: *République d'Irak v M.A.N.,* 2016 Rev Arb. 1213 (Paris Cour d'Appel, 8 November 2016); XXXVIY.B. Comm. Arb. 337, para 19 (Swiss Fed. Trib., 28 July 2010); XXIX Y.B. Comm. Arb. 834 (Swiss Fed. Trib., 8 December 2003).

There are currently 27 applications,[62] mostly lodged in 2018-2021, which raise issues relating to various aspects of the reform of the judicial system in Poland under laws that entered into force in 2017-2018. In 17 cases notice was given to the Polish Government in 2019-2020. Moreover, the Court has decided that all current and future applications concerning complaints about various aspects of the reform of the judicial system in Poland should be given priority (Category I). In accordance with the Court's prioritisation policy, this level of priority is assigned to urgent cases. The relevant applications generally involve complaints under Article 6(1) ECHR (independent and impartial tribunal established by law; access to a court; unfairness of procedures for demoting of judges and disciplinary proceedings against judges and prosecutors).

It must be emphasized, however, that in all instances, at the core of discussion there is a set of specific issues concerning the organisation of the justice system that need to be taken into account when analysing judicial independence: these are the rules pertaining to the appointment of members and protection of their term of office, the existence of guarantees against external pressure and maintenance of the appearance of the independence. Given that each of these specific arrangements concerning the performance of the role of judges in some ways touches on the three aspects of independence of the judicial system and, at times, also on impartiality, no wonder that the ECtHR finds it difficult to maintain clear and coherent demarcation lines between the various components of judicial independence and impartiality.

In the remainder of this casebook, we will, therefore, depart from the abstract notions that conceptions of judicial independence and impartiality and focus on more practical manifestations of how these overlapping ideals are manifested in the organisation of the system of justice.

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[62] Among others, see *Tuleya v Poland* App no 21181/19 (ECtHR, communicated on 1 September 2020), *Grzęda v Poland* App no 43572/18 (ECtHR, hearing on 19 May 2021), *Broda v Poland* App no. 26691/18 (ECtHR, 29 June 2021) and *Bojara v Poland* App no. 27367/18 (ECtHR, communicated on 2 September 2019), *Żurek v Poland* App no. 39650/18 (ECtHR, communicated on 14 May 2020), *Sobczyńska and Others v Poland* App nos. 62765/14, 62769/14, 62772/14 and 11708/18 (ECtHR, communicated on 14 May 2020) or *Advance Pharma Sp. z o.o. v Poland* App no 1469/20 (ECtHR, communicated on 14 May 2020).

2) The European Union legal order – between Art. 267, Art. 19 and the EU Charter of Fundamental Rights

1. Background to the origins and evolution of the concepts of judicial independence, impartiality in European Union law

Before exploring in more detail the European Union law approach to notions of judicial independence and impartiality, a brief note must be made on the historical origins and the context within which the EU activity in this area taken on the strength. To an extent, this reflection is at times present in the position of the Polish government in cases referring to the rule of law crisis.[63]

Firstly, the case law of the Court of Justice of the European Union focused on the position of the Courts is directly linked to the need to ensure effectiveness of EU law through the possibility of requesting a consistent interpretation or a validity check from the Court of Justice of the European Union under Art. 267 TFEU preliminary reference procedure. This is where the Court for the first time reflected on the quality of the bodies that are invited to undertake the discussion with the Court. Specifically, it focusec on two elements of the brief definition entailed in Art. 267 TFEU: these are the 'courts or tribunals' that are 'established by law' and are therefore equipped in the characteristics of independence and impartiality who can request CJEU's opinion on a specific issue of law. In terms of litigation strategy Art. 267 TFEU serves both individuals (judges) and defending of their own position (as in *A.K., A. B.* or *IS*)[64] as well as civil society organisations (as in *Repubblika).*[65]

Furthermore, with the evolution of Area of Freedom, Security and Justice (AFSJ), the evaluation of the notion of a 'court and tribunal' gained on a new dimension: in its light, the European Union law and EU Member States evaluate the possibility of granting mutual trust to these bodies, and mutual recognition to their judgements.[66]

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[63] The Polish government consistently emphasises the lack of competence of the Union in this area. See for instance position of the Polish government in Case C-619/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:531, paras 40-41.

[64] Case C-585/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982; Case C-824/18 *A.B.*[2021] ECLI:EU:C:2021:153, Case C-564/19 *IS* [2021] ECLI:EU:C:2021:949.

[65] Case C-896/19 *Repubblika v Il-Prim Ministru* [2021] ECLI:EU:C:2021:311.

[66] See, for instance: Case C-551/15 *Pula Parking* [2017] EU:C:2017:193, paras 42, 52.

The final strand of cases giving the opportunity to CJEU to conjure the standard lies in the infringement proceedings that so far have been initiated mostly against Poland.[67]

We will account on these basic elements as the starting point in the reconstruction of the standard of judicial independence and impartiality in the EU context.

Only with the current rule of law crisis does one see a more in depth, systemic approach that the Court undertook to define the component of rule of law related to the organisation of the justice system. In a series of cases the Court makes a connection between Art. 2 TEU that offers an account of EU values Member States committed to, Art. 4(3) outlining the basics of the principle of sincere cooperation resting on the Member States and Art. 19(1) 2nd sentence TEU fleshing out particular element of the latter principle reflecting the need for the effective judicial protection in the fields covered by Union law.

Only against the background can we appreciate the full extent of the components of the standard of judicial independence and impartiality in the EU context.

[67] C-204/21 - *Commission v Poland (and private life of judges)* [2021] ECLI:EU:C:2021:878 (interim measures); C-791/19 - *Commission v Poland (Disciplinary regime of judges)* [2021] ECLI:EU:C:2021:596; C-619/18 - *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI:EU:C:2019:531; C-192/18 - *Commission v Poland (Independence of ordinary courts)* [2019] ECLI:EU:C:2019:924).

2. Jurisprudence on the interpretation of the concepts of 'court or tribunal' and 'established by law' under Art. 267 TFEU

Definition of 'court or tribunal'

According to the dictum of *MT Højgaard and Züblin*[68] The notion of court or tribunal is an autonomous concept of EU law, which implies that national law is not decisive in determining whether a given body may refer a question to CJEU. It is up to the CJEU to make such evaluation. When performing this task, the CJEU 'will take account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'.[69]

Similarly, in essence, the notion of 'court' within the AFSJ requires the body in question to be impartial and independent, as mandated by the *Pula Parking*[70] (judicial cooperation in civil matters) and *Baláž*[71] (judicial cooperation in criminal matters) cases.

In *Pula Parking* CJEU interpreted the notion of 'court' within the meaning of the Brussels I Regulation. In the case at hand the body subject to Court's evaluation was a Croatian notary.

And so 'the concept of 'court' under the new Brussels I Regulation must be interpreted as taking account of the need to enable the national courts of the MS to identify judgments delivered by other MS' courts and to proceed, with the expeditiousness required by that regulation, in enforcing those judgments'[72] Thus, in the key passage of that judgment, the CJEU wrote that 'compliance with the principle of mutual trust in the administration of justice in the Member States of the European Union which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and

[68] Case C-396/14 *MT Højgaard and Züblin* [2016] ECLI:EU:C:2016:347, para 23.
[69] Case C-61/65 *Vaassen-Göbbels* [1966] ECLI:EU:C:1966:39; Case C-205/08 *Umweltanwalt von Kärnten* [2009] ECLI:EU:C:2009:767, para 35; Case C-203/14 *Consorci Sanitari del Maresme* [2015] ECLI:EU:C:2015:664, para 17.
[70] Case C-551/15 *Pula Parking* (n 69).
[71] Case C-60/12 *Baláž* [2013] ECLI:EU:C:2013:733.
[72] Case C-551/15 *Pula Parking* (n 69), para 54.

in compliance with the principle of *audi alteram partem*'.[73] Croatian notaries did not fulfil this condition.

Baláž[74], on the other hand, concerned Interpretation of the notion of a 'court having jurisdiction in particular in criminal matters' for the purposes of Framework Decision 2005/214. The criminal matters at hand were the ones in which a MS's legislation would provide for either administrative or criminal offences.[75] Jurisdiction entails both application of criminal procedure provisions as well as 'a procedure which satisfies the essential characteristics of criminal procedure'.[76]

In both cases, be it when considering the notion of the 'court' under the remit of Art. 267 TFEU and within the framework covered by mutual recognition regimes, the European Union law requires that courts are equipped in the characteristics of independence. The Court of Justice does not explicitly build on judgements of ECtHR and in a conceptual manner slightly departs from the abstract understanding of notions of judicial independence.

In the case law of CJEU the concept of judicial independence has both an internal and an external dimension. Internally, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. Externally, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them (as developed in *Wilson*)[77]. In other words, in abstract terms, internal independence within the remit of European Union law encompasses elements of impartiality, whereas externally it encompasses both independence from other branches of power and internal judicial independence.

Considering the case law of the CJEU evaluating specific practical concrete issues of judicial independence, the protection of the judiciary entails, *inter alia,*

- existence guarantees against removal from the office;[78]

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[73] *Ibid.*
[74] Case C-60/12 *Baláž* (n 74).
[75] *Ibid* para 32.
[76] I*bid* para 36.
[77] Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587, paras 49 – 52.
[78] See for instance Case C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECLI:EU:C:1998:497, para 20, Case C-103/97 *Köllensperger and Atzwanger* [1999] ECLI:EU:C:1999:52, para 21, but also Case C-53/03 *Syfait and Others* [2005] ECLI:EU:C:2005:333, para 31 vis-à-vis members of the competition authority.

- in administrative justice context that judicial power should be exercised by a body that acts as a third party in relation to the authority which adopted the contested decision;[79]
- absence of any 'hierarchical constraint or subordination to any other body that could give [..] orders or instructions';[80]
- absence of rules that may deter judges from referring preliminary questions to the Court of Justice of the European Union (clearly this element of judicial independence has a broader implication for the EU legal order)[81].

Definition of 'established by law'

In the view of the Court, there is a close link between the need for a Court to be established by law and the principle of judicial independence. Specifically, it is necessary to examine whether an irregularity committed during the appointment of judges 'create[s] a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining

[79] Thus, for example, in *Devillers*, the CJEU ruled that the Belgian Regional Council of the Society of Veterinary Doctors was not a third-party for the purposes of making a preliminary reference, since it was the body responsible for imposing disciplinary sanctions against the applicant in the main proceedings, i.e. a veterinarian who had allegedly violated the relevant rules of professional conduct. See: Case C-167/13 *Devillers* [2013] ECLI:EU:C:2013:804, para 19.

[80] Therefore, in *Margarit Panicello*, the CJEU ruled that the Registrar ('*Secretario Judicial*') of a Spanish court did not constitute a 'court or tribunal' within the meaning of Article 267 TFEU, since she was required to comply with instructions from a hierarchical superior when making a reference in the context of an action for the recovery of fees due for legal services. See: Case C-503/15 *Margarit Panicello* [2017] EU:C:2017:126, paras 41 and the following.

Also to the same effect, see: Case C-49/18 *Escribano Vindel* [2019] ECLI:EU:C:2019:106, para 66: 'The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. Like the protection against removal from office of the members of the body concerned, the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence (C-64/16, *Associação Sindical dos Juízes Portugueses* [2018] EU:C:2018:117 paras 44 and the following)'.

[81] See Case C-791/19 *Commission v Poland (regime disciplinaire des juges* (n 70), paras 215- 234, and specifically: '229. In the present case, it must be borne in mind that it is already apparent from the examination which led the Court to uphold the first complaint brought by the Commission that the definitions of the disciplinary offence contained in the provisions of [the law at stake] do not meet the requirements derived from the second subparagraph of Article 19(1) TEU, since they give rise to the risk that the disciplinary regime at issue might be used for the purpose of creating, in respect of judges of the Polish ordinary courts, pressure and a deterrent effect which are likely to influence the content of the judicial decisions which those judges are called upon to give. 230 Such a risk also concerns the decisions by which a national court is called upon to choose to exercise its discretion under Article 267 TFEU to submit a request for a preliminary ruling to the Court of Justice or, where appropriate, to comply with its obligation to make such a reference for a preliminary ruling under that provision.'

the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned'[82]

And it is, therefore, in the ground-breaking *Simpson and HG* that the CJEU gave for the first time an interpretation and application of the term 'established by law' to comprehensively review a judicial appointment procedure. Importantly, in line with its para 57, the check whether the court is indeed 'established by law' is an obligation of each court on its own motion.[83] In the later opinion of AG Tanchev in C-487/19 and C-508/19 emphasized that this criterion refers, though, to a breach of rules in judicial appointment and not, per se, to the general shortcomings in the manner in which a given justice system is organised.[84]

3. In the framework of Art. 267 TFEU in connection with Art. 47 of the Charter of Fundamental Rights

The Court's understanding and interpretation of the notion of the independent and impartial tribunal has been also affected by the inclusion in the reasoning of the Court of Art. 47 of the Charter of Fundamental Rights starting back with *El Hassani*.[85] In this early case the Court took into account the previous case law (based on Art. 267 TFEU) and relied on *Wilson.*[86] However, this does not offer the sufficient information as to which elements of the notion of the 'court established by law' matter when evaluating the position of a singular judge, and in particular his or her independence and impartiality.

The most complete reflection on the relationship between the standard that emerged against the background of Art. 267 TFEU in connection with Art. 47 CFR stems from the Opinion of Advocate General Bobek in Case *Getin Noble Bank*.[87] The case concerns the assessment of circumstances of the appointment of a judge who was evaluating in a single-judge formation a question of law in a given case. The judge was appointed to his position before the democratic transition in 1989 and this is precisely the circumstance which could potentially affect judge's

[82] Joined Cases C-542/18 RX-II and C-543/18 RX-II *Simpson and HG* [2020] ECLI:EU:C:2020:232, para 75.
[83] *Ibid* para 57.
[84] Opinion of AG Tanchev in Case C-487/19 and C-508/19 *W. Ż. () and des affaires publiques de la Cour suprême - nomination)* [2021] ECLI:EU:C:2021:289, para 81.
[85] Case C-403/13 *El Hassani* [2017] ECLI:EU:C:2017:960.
[86] See also for more: Reyns C, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' [2021] European Constitutional Law Review 1 – 27.
[87] Opinion of AG Bobek in Case C-132/20 *Getin Noble Bank* [2021] (ECLI:EU:C:2021:557).

judicial independence and impartiality. The view of AG Bobek can be summarised in the following terms: the role of the notion of a court established by law under Art. 267 TFEU serves a purpose of establishing interlocutors of CJEU in this context. The concepts underlying preliminary reference procedure do not serve a purpose of guaranteeing an effective judicial protection and a right to a fair trial to an individual subject to this protection.[88] Specifically, when addressing the notion of independence, the focus has always been placed on structural, institutional independence from other branches of the judiciary and from the parties.[89] In this context, however, AG reflected further on the position of the CJEU to assess the impartiality and moral integrity of specific judges sitting on a bench, concluding that probably the Court is ill-equipped to conduct such an analysis at the level of the evaluation of admissibility of a preliminary reference question. Probably this could be done at a later stage in the proceedings but even there the analysis of facts in a given circumstances of the case seemed to be extremely demanding leading to a circular analysis of the provisions.[90] It may then well be that such analysis will result in the conclusion that Art. 19 TEU and Art. 47 CFR have been breached, however provided that the entire judicial institution has not been 'hijacked' and can therefore no longer be considered a court, they should not automatically result in the inadmissibility of the order for reference made by a supreme court of a Member State.

In the judgement the Court puts together the conditions under which a body, a court or a tribunal under Art. 267 TFEU can contribute to effectiveness of EU law in line with provisions of Art. 19 TEU. In doing so, it builds on a series of cases from the second half of 2021 and outlines conditions of appointments.[91] Having first asserted its own jurisdiction (albeit as of the entry into the EU[92]) the Court emphasized the fact it should be borne in mind that, 'although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (judgment of 20 April

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[88] *Ibid* paras 47, 50 and 65.
[89] *Ibid* para 63.
[90] *Ibid* paras 69 - 70.
[91] 'It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 16 November 2021, Prokuratura Rejonowa w Mińsku Mazowieckim and Others, C-748/19 to C-754/19, EU:C:2021:931, paragraph 67 and the case-law cited).' Case C-132/20 *Getin Noble Bank* [2022] ECLI:EU:C:2022:235, para 95.
[92] *idem*, paras 67-87.

2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 48).'[93] It continues to reiterate the standard as developed so far in the following terms:

> '89. As the second subparagraph of Article 19(1) TEU provides, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), and which is now reaffirmed by Article 47 of the Charter. That provision must, therefore, be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 102 and the case-law cited).
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> 90. As regards the material scope of the second subparagraph of Article 19(1) TEU, that provision refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 103 and the case-law cited).
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> 91. Under the second subparagraph of Article 19(1) TEU, every Member State must thus in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the

[93] *Ibid* para 88.

requirements of effective judicial protection (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C-487/19, EU:C:2021:798, paragraph 104 and the case-law cited).'[94]

4. In the framework of Art. 6(1) EAW framework decision the concept of 'judicial authority'

The European Union narrative of judicial independence becomes a bit more nuanced in the context of a judicial body that can participate in the procedures involving mutual trust and mutual recognition. Of specific relevance is the judicial dialogue concerning the notion of a 'judicial authority': a body which participates in the administration of criminal justice and whose decision should be recognised and implemented by a court in another Member State. It must be noted that the importance of existence of appropriate guarantees concerning the judicial authority is related to the fact that consciously the EAW features a two levelled protection of an individual in the process: the first level relates to the adoption of the national decision, such as a national arrest warrant; whereas the second must be afforded when an EAW is issued. It will be, therefore, for the judicial authority issuing a warrant to examine whether it is necessary and proportionate to do so.[95]

In such context, therefore, the position of this body (and of the entirety of the system of justice) is examined from the external perspective of a Member State that will enforce the decision of such body. The Court of Justice of the European Union first focused on the identification of bodies that would fall within the scope of 'judicial authority' whose characterising feature is, in fact, independence.

Firstly, in its analysis, the CJEU concluded that a judicial authority must be independent from the executive. The Court evaluated the position, among others, of the Swedish Police Board who issued a decision for the purposes of executing a custodial sentence *(Poltorak),*[96] of the

[94] *Ibid.*
[95] Case C-241/15, *Bob-Dogi* [2016] EU:C:2016:385, para 56 and Case C-477/16 *Kovalkovas* [2016] EU:C:2016:861, para 47.
[96] Case C-452/16 PPU *Poltorak* [2016] EU:C:2016:858.

Lithuanian Ministry of Justice *(Kovalkovas)*[97] and a European Arrest Warrant issued by the Hungarian police and subsequently confirmed by the public prosecutor's office *(Özçelik)*.[98]

Similarly, to the notion of a 'court or a tribunal' under Art. 267 TFEU, the term 'judicial authority' is an autonomous notion of EU law as it needed to be interpreted in a uniform manner across the Member States.[99] In *Poltorak* the CJEU held that the reference made to the law of the issuing Member State is limited to the designation of the judicial authority having the competence to issue EAWs. This concept is not limited to judges or courts of an MS only, but may extend, more broadly, to the authorities required to participate in administering criminal justice in the legal system concerned.[100] However, it does not include the police, which must be distinguished from the judiciary, in accordance with the principle of the separation of powers which is intimately connected to the operation of the rule of law, from the executive.[101] Similarly, in *Kovalkovas* the CJEU did not consider the Minister of Justice to fall within the category of a 'judicial authority in line with Art. 6(1) EAW Framework Decision. Similarly, EAW decision was taken in detachment from the custodial sentence passed by a judge and as such was not subject to a control by a judicial authority.[102]

In this strand of judgements *Özçelik* is slightly different as it focuses on the term of judicial decision and not 'judicial authority', however, both the AG Campos Sánchez-Bordona and the CJEU ultimately conflate the analysis. Importantly, AG comments on the distinction between Art. 267 TFEU based concept of the 'court or tribunal' and points to the more diversity in decision making in criminal proceedings. Specifically, the PPO may not make a reference to the CJEU, since it is not called upon 'to rule on an issue in complete independence but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body'.[103] However, extending the application of the principle of mutual recognition beyond the notion of 'courts' requires compliance with the principle of mutual trust. This meant, in *Özçelik*, that the EAWs confirmed by the PPO could only benefit from

[97] Case C-477/16 *Kovalkovas* (n 98).
[98] Case C-453/16 PPU *Özçelik* [2016] ECLI:EU:C:2016:860.
[99] Case C-452/16 *Poltorak* (n 99), para 32.
[100] *Ibid,* paras 33-34; subsequently consistently reiterated in other case law, see, for instance: Joined cases C-508/18 and C-82/19 PPU *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)* ECLI:EU:C:2019:456, para 50.
[101] *Ibid,* paras 33-34.
[102] Case C-477/16 *Kovalkovas* (n 98), para 47.
[103] Opinion of Advocate General Campos Sánchez-Bordona in Case C-453/16 PPU *Özçelik* ECLI:EU:C:2016:783, para 62.

free movement because that office was independent from the executive and participated in the administration of justice.[104]

To ensure consistency between the various provisions of the EAW Framework Decision, the CJEU held that the same rationale applied. This meant that the term 'judicial decision' covered decisions of the Member State authorities that administer criminal justice, but not police services. Nevertheless, the CJEU found that the PPO constitutes a Member State authority for the purposes of administering criminal justice. Thus, unlike the EAWs issued in *Poltorak* and *Kovalkovas*, the CJEU found that the EAW issued by the Hungarian police and confirmed by the PPO constituted a 'judicial decision' within the meaning of the EAW Framework Decision.[105]

In 2019, five judgements concerning the concept of 'judicial authority' were issued in which the centre of attention was taken by the concept of independence of judicial authority under Art. 6(1) EAW FD. Importantly, the reflection led to the raising of the expectation towards executing bodies to examine the systemic and institutional safeguards of independence in an issuing state as per *LM* dictum requiring a two-step analysis of systemic deficiencies of the justice system of the state issuing the EAW.[106]

These preliminary rulings mostly concerned with the independence of national public prosecutor's offices, and their capacity for meeting the necessary requirements of issuing judicial authority. The saga was opened by two judgments concerning the Prosecutor General of Lithuania and that of Germany. In *Minister for Justice and Equality* v *PF* the CJEU observed that the public prosecutor prepares the ground for the exercise of judicial power by the criminal courts of that Member State. Therefore, it is capable of being regarded as participating in the administration of criminal justice.[107] In exercising the powers conferred on it, the Prosecutor General of Lithuania must satisfy itself that the requirements necessary to issue an EAW are met. The constitutional framework of Lithuania guarantees the Prosecutor General of Lithuania the benefit of that independence. This led the Court to the finding that that authority will fall within the scope of Article 6(1) EAW FD.

[104] *ibid.*
[105] Case C-453/16 PPU *Özçelik* (n 101), para 34.
[106] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice) LM*, [2018] ECLI:EU:C:2018:586.
[107] Case C-509/18, *Minister for Justice and Equality* v *PF* [2019] ECLI:EU:C:2019:457, para 42.

However, the CJEU took care to clarify that the executing authority should determine whether a decision of the Prosecutor General to issue an EAW may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection.[108]

The opposite conclusion was reached in the case of the German public prosecutors. In *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)* the CJEU emphasized that the issuing judicial authority must be in position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the execution of those of its responsibilities, which are inherent in the issuing of an EAW. That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive.[109]

The public prosecutors' offices did not satisfy the requirement of independence inherent in the concept of 'issuing judicial authority' under the FD not on the basis of material indicating the existence of systemic or generalised deficiencies concerning the independence of the judiciary of the Member State to which those public prosecutors belonged, but on account of statutory rules and an institutional framework, adopted by that MS by virtue of its procedural autonomy, which made those public prosecutors' offices legally subordinate to the executive and thus exposed them to the risk of being subject to directions or instructions in a specific case from the executive in connection with the adoption of a decision to issue a European arrest warrant.[110] The German Minister for Justice has, in fact, an 'external', albeit not regulated in detail, power to issue instructions in the specific case to the public prosecutor's office, which in turn enables the Minister to have a direct influence on a decision concerning the EAW.[111] In the case at hand, therefore, the influence of the executive on the decision of issuing of an EAW could not be wholly ruled out and the public prosecutor's office could not be considered a judicial authority under Article 6 EAW FD.[112]

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[108] *Ibid* para 56.
[109] Joined cases C-508/18 and C-82/19 PPU *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)* (n 103) para 74.
[110] As per para 48 of the parallel case: Joined Cases C-354/20 and C-412/20 L. and P [2019] EU:C:2020:103.
[111] Joined cases C-508/18 and C-82/19 PPU *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)* (n 103) (n 103) paras 76-77.
[112] Joined cases C-508/18 and C-82/19 PPU *OG and PI (Lübeck and Zwickau Public Prosecutor's Offices)* (n 103) (n 103) paras 81-83 as discussed in Mancano 711. Compare the analysis of the position of public prosecutor in

The subsequent case was decided already in the context of the raving rule of law crisis in Central European Member States. Specifically, they examined the implementation of the *LM* two-tier test in the context of the implementation of an EAW FD, starting from the conviction that judicial authority shares the features of independence.

The discussion starts here with *L. and P.*[113] reference from the Amsterdam Court of Appeal that follows to a large extent the chief recommendation of AG Campos Sánchez-Bordona suggested linking the assessment with the decision taken by the European Council under Art. 7(2) TEU.[114] In brief, the CJEU elaborated on the relationship between systemic deficiencies of a justice system in an issuing Member States and a doubt concerning judicial independence of a given judge adjudicating in a case of a given individual subject to a surrender decision. Even though the Court emphasized the importance of judicial independence as a part of a right to a fair trial and a constituent feature of EU values enshrined in Art. 2 TEU,[115] it observed that existence of such deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case.[116] Were this the case, no court or tribunal of this Member State would be able to refer a question to the CJEU under Art. 267 TFEU.[117] Therefore, to be able to accept that such systemic deficiencies affected a position of a singular adjudicating judge; the executing authority must examine one more element.

Namely, it must be assessed whether in relation to the person with regard to whom an EAW was issued; there are further substantial grounds for believing that this person will run a real risk of breach of his or her fundamental right to a fair trial if he/she is surrendered to the issuing Member State. It is for executing authority to assess whether, having regard to the personal

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France as in Joined Cases C-566&626/19PPU, *Parquet général du Grand-Duché de Luxembourg* [2019] ECLI:EU:C:2019:1077. Specifically, the Court pronounced itself on independence of such judicial authority which is to possess external judicial independence, which, however, may be undermined by the existence of the power to provide instructions in a given case. Even if independence a judicial authority is guaranteed according to this conclusion, the CJEU still requires a form of a judicial oversight over the issued EAW, which in the case of France exists in the form of the possibility to challenge the decision at the basis of EAW.

Similar conclusion was reached with reference to the EAW issued by Austrian prosecutors, where the entire process is subject to a judicial oversight. Case C-489/19PPU, *NJ* [2019] EU:C:2019:849.

[113] Joined Cases C-354/20 and C-412/20 PPU - *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission) L and P* [2019] EU:C:2020:1033.

[114] Opinion of AG Campos Sánchez-Bordona in Joined Cases C-354/20 and C-412*/20 PPU - Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission) L and P [2019*] EU:C:2020:925, paras 76 and 83 among others.

[115] Joined Cases C-354/20 and C-412/20 PPU - *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission) L and P* (n 116), paras 39-40.

[116] *Ibid,* paras 42-44.

[117] *Ibid;* reasoning after the judgement in case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117, paras 38 and 43.

situation of the person whose surrender is requested by the EAW concerned, the nature of the offence for which he or she is being prosecuted and the factual context in which the arrest warrant was issued, such as statements by public authorities which are liable to interfere with the way in which an individual case is handled, and having regard to information which may have been communicated to it by the issuing judicial there are substantial grounds for believing that that person will run a real risk of breach of his or her right to a fair hearing once he or she has been surrendered to the issuing MS. [118]

As it is clear from this strand of CJEU's case law, judicial independence is a precondition for the definition of judicial authority. This is a fundamental component of the system of effective protection that must be guaranteed in the context of EAW procedures. However, independence understood as an inherent component of the concept of judicial authority and effective judicial protection should not be collapsed together.

In this sense, the existence of a judicial remedy against the decision, taken by an authority other than a court to issue an EAW, is not a condition for classification of that authority as an issuing judicial authority within the meaning of Article 6(1) EAW FD, as long as that authority has institutional independence. The requirement of judicial oversight of a decision taken by a body that is not a court or tribunal does not fall within the scope of the statutory rules and institutional framework of that authority, but concerns the procedure for issuing such a warrant, which must satisfy the requirement of effective judicial protection.[119] That protection must be in place in the issuing State and activated before execution of the EAW: a national law providing for judicial review only after surrender would not meet the requirements inherent in Article 47 of the EU Charter of Fundamental Rights (see *OG and PI*).

[118] *Ibid,* paras 59-61.

[119] Joined Cases C-566&626/19 PPU *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie v JR and YC* (n 115), paras 48 and 63.

5. In the framework of Art.19(1) TEU in connection with Art. 47 of the Charter of Fundamental Rights (and Art. 2 TEU)

The understanding of the notion of judicial independence in the European Union context has gained much thanks to the strand of the case law focused on judicial reforms in Central and Easter Europe that have been introduced by a right-leaning governments. The resulting discrepancy between values represented in the European Union treaties and those in 'new' Member States have grown to a full-fledged rule of law crisis. There is also a difference in the focus of jurisprudence prior to this point as best described by AG Tanchev in his opinion in *W. Ż. and des affaires publiques de la Cour suprême – nomination*): the standard described by the CJEU in *Simpson and HG*[120] (paragraphs 75 and 79) focuses on 'a breach of the rules on the organisation of justice and, in particular, the appointment of judges: hence that judgment relates to an *infringement of rules'*. *A. K and Others,* on the other hand 'provides criteria for assessing whether the *legal framework concerning the organisation of justice per se* provides the necessary guarantees so as to ensure the independence and impartiality of judges'.[121] In fact, the most recent strand in the case law brings finally to the attention the voicing of the content of EU values, and, in particular, of the meaning of the 'independence and impartiality' of judges. The legal basis for this new strand of cases brings is rooted in the interaction between Art. 19 TEU, Art. 47 CFR and Art. 2 TEU.

In fact, the CJEU, could not agree more with above-quoted Tanchev's reading of the relevance of Art. 19(1) second paragraph TEU and thus summarizes its earlier case law:

'As the second subparagraph of Article 19(1) TEU provides, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective legal protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, and which is now reaffirmed by Article 47 of the Charter (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 190 and the case-law

[120] Opinion of AG Tanchev in C-487/19 and C-508/19 *W. Ż. () and des affaires publiques de la Cour suprême – nomination)* (n 87), para 81.
[121] *Ibid*.

cited). That provision must, therefore, be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 20 April 2021, *Repubblika*, C‑896/19, EU:C:2021:311, paragraph 45 and the case-law cited).'[122]

Two questions emerge against the background of this statement. Firstly, there appears a question as to the general standard of 'effective judicial protection' rooted in Art. 6(1) ECHR, Art. 47 CFR and Art. 48 CFR (inasmuch as the right to defence is concerned). Secondly, the true challenge in this strand of case law is to determine a threshold of breach of Art. 19(1) second paragraph TEU. The case law of CJEU slowly provides the answers to these two problems.

As far as the content of obligations under Art. 19(1) second paragraph TEU in connection with Art. 47 CFR is concerned, the CJEU adopted the broadest possible interpretation. Firstly, it emphasized that the application of Art. 19 is broader in its scope than that of Art. 51 CFR. Thus, the Member State must ensure effective judicial protection not only when they implement Union law, but in broadly understood scope of Union law, also when the Member States exercise their own competence. In addition, given the fact that Art. 2 TEU reflects a set of conditions to be fulfilled by the Member States, if they wish to enjoy rights and freedoms linked to the Union membership, it is up to the Member States to maintain the standard of rule of law protection in order and 'to 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 judges'[123] In addition, in *Asociaţia 'Forumul Judecătorilor din România' and Others* the CJEU further commands the progression in terms of the development of adequate guarantees in a given Member State.[124] To attribute even more importance to Art. 19(1) TEU, the CJEU implicitly granted it the quality of direct effect in *A.B*.[125]

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[122] Joined Cases C-487/19 and C-508/19 *W. Ż. () and des affaires publiques de la Cour suprême – nomination),* ECLI:EU:C:2021:798, para 102.

[123] Case C-791/19 *European Commission v Republic of Poland* (n 70) para 2. Consider also a pending case C-204/21, *Commission v Poland* [2021] EU:C:2021:593, where so far the Court ordered on 14 July 2021 interim measures in the form of the suspension of adjudication by the Polish Supreme Court's Disciplinary Chamber.

[124] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România'* [2021] EU:C:2021:393. For more on the case, see: Moraru M and Bercea R, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociaţia 'Forumul Judecătorilor din România, and their follow-up at the national level' [Cambridge University Press] European Constitutional Law Review 1.

[125] Case C-824/18 *A.B.* (n 67).

Secondly, it was already clear in *Associação Sindical dos Juízes Portugueses*[126] that the content of obligations of Member States under the second subparagraph of Article 19(1) TEU is determined by Art. 47 CFR: the fact that was elaborated on in the subsequent case law of CJEU. Subsequently, AG Tanchev in *Commission v Republic of Poland (Disciplinary Chamber of the Supreme Court)* is of the opinion that Art. 19(1) TEU's interpretation of 'effective judicial protection should include the right to a court established by law, the right to have a case examined within a reasonable time and the rights of the defence, as enshrined in Articles 47 and 48 of the Charter.[127] Subsequently, the Court applied this standard to national measures concerning disciplinary arrangements for judges.[128]

The assessment of the existence of a breach of Art. 19 TEU is a slightly different matter. The Court so far has not given a formula, focusing instead on application and evaluation of infringement in a given case. Still some guidance *in abstracto* can be inferred from the case law and opinions of AGs. To determine a breach of Art. 19 TEU, it is necessary to assess whether that irregularity 'is 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 and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system'.[129]

In specific circumstances of *Commission v Republic of Poland (Disciplinary Chamber of the Supreme Court)* the Court assessed the position of the Disciplinary Chamber of the Supreme Court emphasizing that disciplinary cases concerning judges of ordinary courts must be amenable to review by a tribunal 'established by law.[130] The problem in the case at hand consisted in the fact that in line with the Polish legislation, the President of the Disciplinary Chamber is conferred a discretionary power to designate the disciplinary tribunal with

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[126] C-64/16, *Associação Sindical dos Juízes Portugueses* (n 83) para 45.
[127] Opinion of AG Tanchev in Case C-791/19 European Commission v Republic of Poland, EU:C:2021:366, paras 71-72.
[128] See, in particular: Case C-791/19 *European Commission v Republic of Poland* (n 70) para 192.
[129] Opinion of AG Tanchev in C-487/19 and C-508/19 *W. Ż. () and des affaires publiques de la Cour suprême – nomination)*, (n 87), para 75.
[130] Case C-791/19 *European Commission v Republic of Poland* (n 70), paras. 159-177. The Court in its reasoning emphasized parallelism in its reasoning with the ECtHR, in particular, in case C-38/18 *Gambino and Hyka* [2019] EU:C:2019:628, para 39 and in *Savino and Others v Italy* App nos 7214/05, 20329/05 and 42113/04 (ECHR, 28 April 2009), paras 94 and 95 and the case-law cited).

territorial jurisdiction to hear a disciplinary case of a judge of an ordinary court.[131] The risk of abuse relates to the potential possibility of using such a power could, to direct certain cases to certain judges while avoiding assigning them to other judges, or in order to put pressure on the judges thus designated.[132] In addition, this power is enjoyed by the President of the Disciplinary Chamber, and so, 'the body called upon to hear, as the court of second instance, appeals brought against decisions issued by that disciplinary tribunal, a disciplinary chamber whose independence and impartiality are not guaranteed'.[133] The lack of independence of the Disciplinary Chamber was assessed in the light of the broader context of the reforms of the justice system in Poland, and specifically, the characteristics of the chamber, the modality of the appointment of its members and the context and circumstances in which the Chamber was created, specifically, modification of the modality of appointment and the composition of the National Council of the Judiciary, the shortening of the term of office of the judges in the Supreme Court and the prior amendment of the functioning of the Constitutional Court. The CJEU concluded that all the aforementioned modifications constituted a reduction in the protection of the value of the rule of law and thus a breach of Art. 19(1) TEU.[134]

The Court also offered a reflection on the extent to which judges should be held accountable, should disciplinary measures be considered as fulfilling the conditions of judicial impartiality and independence. Above all, judicial liability can only in very exceptional cases be triggered by a judicial decision passed by a given judge. However, '(s)uch a requirement of independence is clearly not intended to support any serious and totally inexcusable forms of conduct on the part of judges, which would consist, for example, in violating deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law with which they are supposed to ensure compliance, or acting arbitrarily or denying justice when they are called upon, as guardians of the duty of adjudicating, to rule in disputes which are brought before them by individuals'.[135] Such circumstances must be clearly and precisely defined in legislation.[136]

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[131] *Ibid,* para 172.
[132] *Ibid,* para 173; also to that effect, *Miracle Europe kft v Hungary* App No 57774/13 (ECHR, 12 January 2016), para 58.
[133] *Ibid,* paras 80-113.
[134] *Ibid,* paras 112 and the following.
[135] *Ibid, para 137 and 141.*
[136] *Ibid*, para 140, also: in Joined Cases C-83/19, 127/19 & 195/19 *Asociația 'Forumul Judecătorilor Din România'* [2021] EU:C:2021:393, para 234.

6. In the framework of Art.49 TEU post-accession

Finally, what comes to the attention in the case law is the necessary link between the European Union continuous membership and conditions of accession. In two cases so far, the Court has emphasized the obligation to both continuously comply with a set of common values after joining the EU (*Wightman and Others*)[137] and the obligation to maintain the standard of effective judicial protection and judicial independence at least as on the level from the time of accession (*Repubblika*)[138].

In particular in *Repubblika*, the CJEU constructs a revolutionary *passerelle* linking Art. 2 TEU, Art. 49 TEU, and, if cautious approach is needed, Art. 19 TEU. This linkage leads to the conclusive obligation to continue applying the principles after accession to the EU. In addition, as argued by Kochenov, the CJEU can easily use the connection between Art. 2 and Art. 49 TEU to scrutinise the 'fake-reforms' of justice systems in Member States.[139] *Repubblika* is also notable as a case emerging from the context of *actio popularis,* geared to challenge the *inter alia* constitutional provisions governing the procedure of appointment of judges.[140] It confirms the overlap in terms of content of obligations under Art. 47 CFR and Art. 19(1) TEU, which, in the words of AG Hogan, includes but is not limited to, the duty to ensure judicial independence and impartiality.[141]

In a more recent judgement *Asociaţia 'Forumul Judecătorilor Din România'*,[142] concerning this time Romanian reforms of the organisation of the judiciary, the CJEU links in a stronger manner post-accession obligation of Member States in terms of preservation of values. It emphasizes that there exists a common standard of protection of rule of law (with which the Court is ready to engage, however, it proves not necessary in the given case) based on Art. 2

[137] Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:999.
[138] Case C-896/19 *Repubblika* (n 68).
[139] Kochenov, Dimitry Vladimirovich; Dimitrovs, Aleksejs: *Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice, VerfBlog,* 2021/4/28, https://verfassungsblog.de/solving-the-copenhagen-dilemma/, DOI: 10.17176/20210428-101313-0.
[140] Granting the decisive power to the prime minister, which in the view of the CJEU is not precluded per se as long as a body opinionating candidateures is involved in the proces. See Case C-896/19 *Repubblika* (n 68), paras 46, 72-73.
[141] Opinion in Case C-585/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:551, para 85 and Opinion of Advocate General Hogan in Case C-896/19 *Repubblika* ECLI: EU:C:2020:1055.
[142] Joined Cases C-83/19, 127/19 & 195/19, *Asociaţia 'Forumul Judecătorilor Din România'* [2021] EU:C:2021:393.

TEU. The existence of Cooperation and Verification Mechanism (CVM)[143] changes a standard and treatment of Bulgaria and Romania, which, in the view of the CJEU is problematic. And thus, even though documents produced on the basis of CVM decision are relevant, they are not a chief tool for protection of Romanian judges. The reference is always made to the content to Art. 2 TEU and the value of rule of law. National legislation governing organisation of justice in Romania must, therefore, comply with this standard in conjunction with Art. 19(1) TEU.[144] The Court considered the legislation introducing a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors incompatible to the standard as it is not justified by objective and verifiable requirements relating to the sound administration of justice and there are no accompanying guarantees as, first, to prevent 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, secondly, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

Finally, in *Asociaţia 'Forumul Judecătorilor Din România',* the Court lays out the basic rules concerning both the state and personal responsibility of judges for judicial errors.

As far as the state responsibility for judicial decisions made in violation of EU law, the Court recalls *Köbler* conclusions pointing to the fact that '(t)he possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question.'[145] This means that such possibility entails a situation, if

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[143] The Court brings the following facts to the attention: Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption. Importantly, Art. 2, 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, read in conjunction with Articles 2 and 49 TEU, must be interpreted as meaning that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty between the Member States of the European Union and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union. The benchmarks in the Annex to Decision 2006/928 are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it, in the sense that Romania is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Article 4(3) TEU, of the reports drawn up by the Commission on the basis of that decision, and in particular the recommendations made in those reports. Joined Cases C-83/19, 127/19 & 195/19, *Asociaţia 'Forumul Judecătorilor Din România' ibid,* para 178.

[144] *Ibid* para 186.

[145] C-224/01 *Köbler* [2003] EU:C:2003:513, para 42.

under national rules a judicial decision is burdened by a judicial error. The Court emphasized that rules on the national level will be, by necessity, worded in an abstract and general terms, which in itself will not jeopardise judicial independence.[146]

As for personal liability of judges for the damage resulting from a judicial error the Court recognised the value in introducing such rules as conducive for the attainment of the objective of the effective judicial system. However, also in exercising such competence and introducing the rules, the Court emphasized the need to comply with European Union law, in particular the standard of effective judicial protection and independence of courts.[147] The Court emphasized that the system of rules providing for a personal liability of judges for judicial errors may interfere with a principle of judicial independence through affecting decision making of adjudicators.[148] Thus such liability of judges should be limited to exceptional cases governed by objective and verifiable criteria designed to eliminate any risk of external pressure on content of judicial decisions. National provisions should also provide for guarantees of independence pertaining to the time of investigation with due regard given to judge's defence rights. Such criteria should be laid out in clear and precise terms.[149] The Court in brief passed the assessment on the Romanian scenario, appreciating the low likelihood of creating external pressure for adjudicating judges, but condemning the limited guarantees for their right to defence.[150]

To sum up, 'Article 2 and the second subparagraph of Article 19(1) TEU must be interpreted as not precluding national legislation governing the financial liability of the State and the personal liability of judges for the damage caused by a judicial error, which defines the concept of 'judicial error' in general and abstract terms. By contrast, those same provisions must be interpreted as precluding such legislation where it provides that a finding of judicial error, made in proceedings to establish the State's financial liability and without the judge concerned having been heard, is binding in the subsequent proceedings relating to an action for indemnity to establish the personal liability of that judge, and where that legislation does not, in general, provide the necessary guarantees to prevent such an action for indemnity being used as an instrument of pressure on judicial activity and to ensure that the rights of defence of the judge

[146] Joined Cases C-83/19, 127/19 & 195/19, *Asociaţia 'Forumul Judecătorilor Din România'* op. cit. (n 145), para 226.
[147] *Ibid* para 229-231.
[148] *Ibid* para 232.
[149] *Ibid* paras 234-237.
[150] *Ibid* para 239.

concerned are respected, so as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the judges to external factors liable to have an effect on their decisions and so as preclude a lack of appearance of independence or impartiality on the part of those judges likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.'[151]

[151] *Ibid* para 241.

7. The CJEU and arbitral tribunals

The presence of the arbitral institutions in the case law of CJEU is rather limited in part because for a long period the CJEU did not consider the arbitral tribunals as 'court or tribunals' within the understanding of Art. 267 TFEU.[152] Up to *Achmea* case this was done on three occasions only: in *Danfoss (Case 109/88)*, *Merck Canada (C-555/13),* and *Ascendi* (C-377/13). The reasons for accepting its jurisdiction in these cases varied from the fact that arbitration was mandatory (*Danfoss)*, integrated in the national legal system (*Merck Canada)*, or was permanent in nature and fulfilled other conditions.

The *Achmea* judgement confirms the decisive factor allowing for qualifying a court or a tribunal as such under Art. 267 TFEU: namely that it should be an integral part of a national judicial system. This condition was not fulfilled in this seminal judgement.

In the light of the above, given the relative absence of arbitral tribunals from the case law of CJEU, the position of arbitrators has not been addressed in general case law.

[152] Barbara Alicja Warwas, *The state of research on arbitration and EU law: Quo vadis European arbitration?*, EUI LAW, 2016/23 - http://hdl.handle.net/1814/44226 17 *ff*.

3) Before focusing on practical case studies: judicial systems in constant evolution

Obligations of states under ECHR and EU Treaties concerning broadly conceived right to a fair trial, with clearly recognised implications for rule of law in Europe has had an impact on pre-conceptions governing the constitutional arrangements in terms of the relationship between states and international bodies.

And so, under the Convention system, we have seen the challenge of the Polish government to the Court following up on *Xero Flor Sp. Z o. o. v Poland* judgement[153] which declared that the current rules concerning Constitutional Court in Poland put him outside of the concept of 'court established by law' under Art. 6 ECHR. The very same Constitutional Court immediately declared Art. 6 ECHR unconstitutional. Similarly, in the reaction to the judgements of CJEU, the Polish Constitutional Court[154] reopened the discussion on the primacy of European Union law in the Polish legal system.

It seems that this discussion is by all means necessary and inevitable in the light of the expanding scope of the analysis of the CJEU, which started in its case law with the identification of its interlocutors under Art. 267 TFEU and expanded the discussion to incorporate questions concerning broadly understood rule of law and post-accession obligations of Member States concerning the European Union values. To this effect, in *Asociaţia 'Forumul Judecătorilor Din România'* yet another time, however, bringing to the attention Art. 19 TEU as the basis for its conclusion, the Court emphasized that 'principle of the primacy of EU law must be interpreted as precluding legislation of a Member State having constitutional status, as interpreted by the constitutional court of that Member State, according to which a lower court is not permitted to disapply of its own motion a national provision falling within the scope of Decision 2006/928, which it considers, in the light of a judgment of the Court, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.'[155]

[153] *Xero Flor w Polsce sp. z o.o. v Poland* App No 4907/18 (ECHR, 7 May 2021).
[154] Polish Constitutional Court, K3/21 *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, official translation accessible at < https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> accessed 30 October 2021. Note that this is not the first on the list of constitutional courts in Europe doing so, see: M. Bonelli, 'Let's take a deep breath: on the EU (and academic) reaction to the Polish Constitutional Tribunal's ruling' UM Law Blogpost (29 October 2021) <https://www.maastrichtuniversity.nl/blog/author/118517> accessed 30 October 2021.
[155] Joined Cases C-83/19, 127/19 & 195/19 *Asociaţia 'Forumul Judecătorilor Din România'* (n 145) para 252.

Part II. Practical Case Studies

Introduction – On Designing Case Studies

The five case studies presented below overlap with the two sets of settings in the Member States of the European Union that explain the abundance of cases in some jurisdictions and lack thereof in others. The criterion for the distinction of these settings is that of the active engagement of the governments and powers in the adjustment of the system of administration of justice, and perhaps of a broader reform of the legal system.

The first of the two settings is the one where the reforms have been ongoing, triggering the adoption of new legislation and sparking public debate (and anxiety around the 'new' alike). Adoption of new legislation, especially such that alters profoundly the structure of the administration of justice offers the opportunity to self-reflect and sparks dialogue, which, in the multi-level system of fundamental rights of the European Union necessarily involves courts of various national and supranational levels. On the other hand, given the principle of mutual recognition, especially in the areas of AEW and asylum law, the dialogue also took place horizontally between the courts of the same level. This is the setting where the evolution of the standard of judicial independence, impartiality and accountability is currently taking place in a formalised manner and reflected largely in the below developed and presented case studies.

The second setting is less prolific in the case law (and thus formalised dialogue), however, equally important, as it involves jurisdictions, which are considered to be reliable in terms of their administration of justice and project trust in it. What matters in such contexts is continuous and critical improvement of the system, evolution of deontological dimension and contribution to building of trust both in a given jurisdiction and beyond. In a way, these jurisdictions will need to reflect their architecture and design in the mirror of the standards of judicial independence, impartiality and accountability that are developed against the background of the first setting.

In terms of designing of case studies, their organisation reflects the most visible patterns of circumstances instigating litigation. Within each of the five case studies, we showcase both national and supranational case law focused on topics particularly visible in each of scenarios.

Thus, Case Study 1 starts with the focus on principle of mutual recognition which necessitates mutual trust built on common values, specifically rule of law. The focus is placed on the principle of mutual recognition in the context of EAW and on the application of the two-tier test emerging from the case law of CJEU, specifically in the follow up to *LM*[156] and *L. and P.*[157] cases. The strands of case law are organised according to the national criteria with a brief comment about the future. This scenario offers broad reflection on the position of bodies involved in the administration of criminal proceedings on the one hand, but also in the position of individual judges called to examine the soundness of a system of administration of justice in another Member State of the European Union.

Case Study 2 offers an EU law-based consideration observing courts and tribunals through the lens of Art. 267 TFEU in a specific context of identifying CJEU's interlocutors in a given case. It is useful in cases involving bodies with quasi-judicial functions whose interaction with the CJEU is dependent on them being classified as courts or tribunals and, therefore, possessing a feature of independence and impartiality.

Case Study 3 reflects the account of how a standard of judicial independence, impartiality and accountability affects judges reflecting on one's own legal system. This is often the circumstance where the new legislation and its context are questioned and examined on international level as well as on the national one.

Case Study 4 looks at the actors involved in the processes of assessing one's legal system and ultimately defending the rule of law standard.

Finally, in Case Study 5 the focus is placed on the standard of impartiality of arbitrators and mediators, especially when their conduct departs from what would be expected of an impartial, independent body entrusted with solving a case.

In the final part of the casebook each of the case studies is matched with a hypothetical case study designed as a training tool.

[156] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice) LM* (n 109).
[157] Joined Cases C-354/20 and C-412/20 PPU - *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission) L and P* (n 116).

Case Study 1 – Assessing the guarantees of judicial independence and impartiality in a legal system of another Member States as preconditions of mutual trust - European Arrest Warrant[158]

1. Trends in the jurisprudence

a) The emergence of the standard

Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW)[159] has established a system of surrender between judicial authorities of convicted or suspected persons for the purpose of enforcing judgments or of conducting prosecutions. In the relationship between the Member States, it replaced the multilateral system of extradition based on the European Convention on Extradition of 1957. In a nutshell, the executing judicial authority has a duty to execute the EAW issued by the judicial authority of another Member State. It may refuse to do so only when a compulsory or optional ground of non-execution is applicable. These grounds are listed exhaustively by the Framework Decision.

The principle of mutual recognition, on which the EAW mechanism is based, is premised on mutual trust between the Member States, which requires each Member State to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law, save in exceptional circumstances. In this respect, the leading case is the *Aranyosi and Caldararu* judgment (Joined Cases C-404/15 and C-659/15 PPU)[160], where the ECJ held that national courts acting as executing authorities must perform a two-step test before declining to execute the EAW issued by the judicial authority from another Member State, where the fundamental rights of the interested person might be under threat.

The two-pronged test requires establishing, first, that there are systematic and generalized deficiencies affecting the protection of the fundamental rights in the issuing Member State (notably, because of flaws in the detention system). Executing judicial authorities must rely on information that is objective, reliable, specific and properly updated on the detention conditions

[158] Authored by Nicole Lazzerini, Alessandra Favi & Marcella Ferri, University of Florence and Dr. Adriano Martufi, Leiden University.
[159] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190.
[160] Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen *(Aranyosi and Caldararu)* [2016] ECLI:EU:C:2016:198.

prevailing in the issuing Member State. That information may be obtained from judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State or decisions, reports and other documents produced by bodies of the Council of Europe or the UN.

However, the mere existence of evidence that there are systematic or generalised deficiencies with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment if s/he is surrendered. Therefore, the executing judicial authority must make a further assessment of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his or her detention envisaged in the issuing Member State.

To that end, relying on Article 15 of the EAW Framework Decision, the Court stressed that that authority must request all necessary supplementary information from the issuing judicial authority, which must provide it. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

The approach developed by the Court of Justice in *Aranyosi and Caldararu* has been confirmed in other judgments, notably *ML*[161] and *Dorobantu*[162]. All these cases concerned the prohibition of inhuman or degrading treatments connected to detention conditions. However, since its judgment known as *LM* or *Celmer* (Case C-216/18, *Minister for Justice and Equality*)[163], the Court of Justice acknowledged that the court requested to execute an EAW which stems from a Member State where there are rule of law problems, may be under a duty to refuse such an execution. Before coming to this conclusion, however, that same court may be under a duty to cooperate with the judicial authority issuing the warrant, in order to establish whether the person requested runs a real risk of violation of its right to effective judicial protection as guaranteed by Article 47 CFR, which includes, notably, the right to an independent court. In other words, the decision to suspend judicial cooperation still implies a phase in which judicial cooperation must take place.

[161] Case C-220/18 PPU *ML (Generalstaatsanwaltschaft – Conditions of detention in Hungary)* [2018] ECLI:EU:C:2018:589.
[162] C-128/18 – Dorobantu [2019] ECLI:EU:C:2019:857.
[163] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice) LM* (n 109).

The concept of independence presupposes that the body before which the requested person would be prosecuted exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. Thus, that body must be protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. In the *AK* judgment (Case C-585/18)[164], independence presupposes – among other things – rules regarding the composition of the body and the appointment, length of service and grounds for abstention, rejection, and dismissal of its members. Those rules must dispel any reasonable doubt as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

Moreover, in the judgment known as *L and P* or *Openbaar Ministerie* (Case C-354/20 PPU)[165], the Court of Justice pointed out that, when there is evidence of systemic or generalized deficiencies affecting the judicial system of the authority that issued the EAW, the executing judicial authority cannot presume that the second condition of the *LM* test is also satisfied. By contrast, it must carry out a specific and precise verification which takes account of, *inter alia*, the personal situation of the requested person, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled.

b- Procedural constellations

In addition to the High Court of Ireland that made the reference in the *LM* case, other courts dealt with the two-pronged test developed by the Court of Justice in that judgment. The analysis of the relevant case law (see the following section) shows that the main difficulties – for both the executing judicial authorities and the lawyers of the requested person - concern the ascertainment/evidence of the second condition of the two-pronged test.

[164] Case C-585/18 – A.K. (Independence of the Disciplinary Chamber of the Supreme Court) [2019] ECLI:EU:C:2019:982.

[165] Joined Cases C-354/20 and C-412/20 PPU - *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission) L and P* (n 116).

Deficiencies in the conditions of detention of the issuing Member States

- **C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru (Detention conditions in Hungary and Romania)***
  Referring court: Higher Regional Court of Bremen
- **C-128/18, *Dorobantu (Detention conditions in Romania)***
  Referring court: Higher Regional Court of Hamburg
- **C-220/18 PPU, *ML (Detention conditions in Hungary)***
  Referring court: Higher Regional Court of Bremen

Deficiencies in the system of justice of the issuing Member States

- **C-216/18, *LM (Deficiencies in the Polish justice system)***
  Referring court: High Court of Ireland
- **C-354/20 PPU, *L and P (Deficiencies in the Polish justice system)***
  Referring court: District Court of Amsterdam

2. Presentation of case strands (by country)

Irish case law: direct follow up of the CJEU's* LM *judgment (by Dr. Marcella Ferri, University of Florence)

- **High Court of Ireland, <u>judgment of 1 August 2018</u>, *Minister for Justice and Equality -v- Celmer (No.4)*, [2018] IEHC 484**

  Following the decision of the CJEU in *LM*, the High Court of Ireland applied the two-stage examination defined by the Court of Justice. Ms. Justice Donnelly (High Court) acknowledged the existence of a real risk of violation of the right to a fair trial, deriving from the lack of independence of Polish courts, due to systemic or generalised deficiencies characterising the Polish judicial system. Concerning the second step of the *LM*-test, Donnelly J. decided to seek further information from the judicial authority that issued the EAW, in order to ascertain the existence of a real risk of violation in relation to the specific respondent.

- **High Court of Ireland, judgement of 19 November 2018, *Minister for Justice and Equality -v- Celmer (No.5)*, [2018] IEHC 639**

  According to the High Court, in the case at issue there was a real risk of lack of independence of Polish courts deriving from systemic or generalised deficiencies of the judicial system in Poland. Those deficiencies would affect the national court before which Mr Celmer would be brought if he were surrendered. However, generalised and systemic violations of independence are not in themselves sufficient to constitute a flagrant denial of justice. Notably, Mr Celmer did not produced statistics or any other evidence showing the lack of fairness of trials in Poland, following the adoption of new legislation concerning the judiciary. Furthermore, the respondent had never suggested that the right to know the nature of the charge, the right to counsel, the right to an interpreter, the right to challenge evidence and the right to present evidence, have been breached in Poland after those reforms were passed. Therefore, according to the High Court the systematic and generalised breaches of the independence of the judicial system in Poland did not amount to a flagrant denial of the right to a fair trial of Mr Celmer.

UK case law (by Dr. Marcella Ferri, University of Florence)

- **UK, High Court of Justice of England and Wales, extradition proceedings of Lis, Lange and Chmielewski, [2018] EWHC 2848 (Admin), 31 October 2018**

  The High Court rejected the applicants' argument according to which Polish courts and tribunals can no longer be qualified as judicial authorities, within the meaning of the EAW Framework Decision. The High Court found that such an argument was contrary to the CJEU's judgment in *LM*. The *LM* test and the conclusion that a general suspension of the EAW mechanism can only be the consequence of the activation of an article 7 TEU's procedure are inconsistent with the argument that no Polish court can be regarded as a judicial authority under the EAW Framework Decision. Concerning the fair trial standard, the High Court pointed out that, in the *LM* judgment, the CJEU frequently mentioned the risk of a violation of the 'essence' of the right to a fair trial and did not make any distinction between that concept and the notion of 'flagrant denial of justice'. Therefore, the High Court maintained that no 'sensible distinction' can be made between a breach of the essence of the right to a

fair trial and the flagrancy test. Furthermore, the High Court found the existence of an abstract risk of serious breach of judicial independence in Poland. Nevertheless, in line with the *LM* ruling, the High Court stressed that such finding is not enough to suspend the EAW system in a general way. The second condition of the *LM* test must also be ascertained, by examining the specific impact of the said generalised deficiencies on the applicants' right to a fair trial. In this respect, the High Court found that the lack of political connotation of the applicants' criminal allegations makes it difficult to demonstrate the existence of an individualised risk of an unfair trial. While being sceptical that further information can show the existence of such an individualised risk, the High Court found that the applicants must have the opportunity to bring an appeal, in order to demonstrate that the second condition of the *LM* test is satisfied.

- **UK, Sheriff Court of Lothian and Borders, Edinburgh, case of the Circuit Court of Warszawa-Praga against Patryk Michal Maciejec, [2019] SC EDIN 37, 25 April 2019**

The Sheriff Court recalled that, in accordance with the two-stage test set out by the CJEU in the *LM* judgment, the executing judicial authority must, as a first step, determine the existence of systematic or generalised deficiencies affecting the judicial system of the judicial authority that issued the EAW. If the executing authority finds the existence of such a risk, as a second step, it must carry out a specific and precise assessment to determine whether, in the specific circumstances of the case, there are substantial grounds for believing that the surrender of the requested person will not guarantee him/her a fair trial. To carry out that assessment, the Sheriff Court heard four experts on the Polish judicial system and rule of law issues. They provided the Court with a comprehensive description of the recent changes in the Polish justice system and their serious impact on judicial independence. However, their testimonies did not prove that the said reforms had a specific impact on the Warszawa-Praga Court, in front of which Mr. Maciejec would be sent following his surrender. Moreover, the Sheriff Court recalled that, as the CJEU stated in *LM*, the second step of the test must be carried out, considering the specific circumstances relating either to the requested person or to the offence for which s/he is prosecuted. The Sheriff Court interpreted these criteria as suggesting that 'it should be ascertained whether the

person who is the subject of the EAW is a political opponent or whether he is a member of a social or ethnic group that is discriminated against' (para 90) or whether the offence for which he is prosecuted has a political dimension. Finally, the Sheriff Court specified that the said assessment must be applied only to EAWs issued for the purpose of criminal prosecution. The case is different where an EAW is issued for the purpose of executing a custodial sentence or detention order. In that regard, an additional distinction was made by the Sheriff Court. Where the warrant covers a single charge and sentence, the right to a fair trial does not come into play because the procedures for early release does not amount to a trial. By contrast, when the sentence concerns different charges but only one or some of them are covered by the extradition order, a disaggregation hearing before the requesting judge will be necessary. However, the prospective disaggregation hearing cannot prevent extradition.

Dutch case law (by Dr. Adriano Martufi, Leiden University)

- **Case 13/751948-19, 16 January 2020 (ECLI:NL:RBAMS:2020:181)**

In that case, on the one hand, the Court accepted that rule of law backsliding in Poland creates systemic deficiencies for the right to an independent tribunal, and that this situation impacts widely criminal courts with jurisdiction on cases involving persons requested in the context of EAW. However, this does not prevent the executing authority to scrutinize if this lack of independence has a bearing on the trial of the requested person, thus showing the existence of a risk of violation in the individual case. In the absence of specific information concerning the personal situation of this person, the Court allowed his surrender to Poland. It remained unclear whether this information needed to be sourced exclusively by the suspect or his lawyer.

- **Case RK 20/771 13/751021-20, 10 February 2021 (ECLI:NL:RBAMS:2021:420)**

The case is the direct follow-up to the case of *L* (one of the two joint cases decided by the Court of Justice in its preliminary ruling of 17 December 2021). In this case, for the very first time, the Courtof Amsterdam concluded that surrender should be refused. Recent reforms of judiciary and the ongoing activity of the disciplinary chamber of the supreme court have a 'chilling effect'affecting all Polish judges. Even more crucially, to demonstrate the existence of a risk in the individual case (risk *in concreto*) is the

fact that, from information gathered by the Court, it appears that several judges of the regional court of Poznan (the one with jurisdiction on the case of *L*) were targeted by disciplinary procedures as of 2019. In addition, as a result of the outcry in the Polish media generated by the decision to refer the case to the Court of Justice, it appears that the requested person could no longer be seen as a 'random Polish suspect', ashe became the focus of special attention from the authorities (including the Dutch PPO), so that there is a danger that the aforementioned 'chilling effect' will have a concrete impact onhis proceedings.

- **Case 13/751380-19, 22 April 2021 (ECLI:NL:RBAMS:2021:1975)**

The Court allows the surrender of the requested person to Poland. Here the Court reiterates that is in principle up to the person concerned (and his or her lawyer) to provide, wherever possible, concrete information about the personal situation of the person surrendered (or the nature of the offenceconcerned or the factual context in which the EAW was issued) that may be relevant when assessing whether a violation will occur. The requested person has not provided suchinformation. The Court thus rejected the assertion that situation of the suspect was similar tothe situation of the person in the judgment of 10 February 2021. In that case, in brief, it was important that the requested person and his criminal case had come under the special attentionof the Polish authorities, including the Polish prosecutor's office, the executive power and themedia. It has not become apparent that this is also the case with the requested person in this case. Therefore, the request from Polish authorities had to be executed.

Italian case law (by Dr. Alessandra Favi, University of Florence)

- **Supreme Court of Cassation, Criminal Section, VI section, no. 54220/2018, 29/11/2018, ECLI:IT:CASS:2018:54220PEN**

The decision originated from an appeal brought before the Supreme Court for the annulment of the decision of the Court of Appeal of Bologna to execute an EAW against the applicant, a Polish citizen. One of the applicant's arguments was that the Court of Appeal disregarded the *LM* judgment of the Court of Justice. According to the applicant, the Court of Appeal did not apply the principle requiring the Italian authorities to refrain from executing the EAW when the person concerned runs a real

risk of suffering from a breach of her fundamental right to an independent court in the Member State that issued the EAW. The Court of Cassation rejected the appeal as unfounded. At the outset, it summarised the main points of the *LM* judgment and found that the Court of Appeal of Bologna correctly applied it. Notably, the Court of Appeal correctly stated that the applicant was not able to show a clear link between the systemic problems in Poland and the existence of a concrete, personal risk of violation of the right to an independent judge. He rather presented generic allegations without proving sufficient information. Furthermore, according to the Court of Cassation, the simple quotation of the *LM* judgment by the applicant is not sufficient to trigger the scrutiny by the national court on the existence of the risk of a breach of the fundamental right to a fair trial.

- **Supreme Court of Cassation, Criminal Section, VI section, 49548/2019, 3/12/2019, no. 49548, ECLI:IT:CASS:2019:49548PEN**

The judgment concerned an appeal raised before the Court of Cassation by a Polish citizen for the annulment of the decision of the Court of Appeal of Milan to execute an EAW issued by Poland against the applicant. The latter claimed that the Court of Appeal failed to recognize that, if returned to Poland, he would risk a breach of his right to a fair trial due to the recent judicial reforms undertaken in that Member State. Moreover, the applicant also claimed that the Court of Appeal failed to request additional information from the Polish authorities in order to assess the risk of breach of the right to a fair trial. The Supreme Court found the appeal inadmissible. Notably, it held that the Court of Appeal correctly applied the *LM* judgment of the Court of Justice. It then confirmed the findings of the Court of Appeal and stated that the executing judicial authority cannot refrain from executing an EAW solely on the basis of generic allegations concerning generalised deficiencies in the judicial system of the issuing Member State. In principle, the executing authorities must verify whether there are substantial grounds for believing that the person will run a risk of breach of her fundamental right to a fair trial, if returned to the issuing Member State. In the case at issue, however, the applicant did not present any evidence to substantiate his claim and therefore there was no need to request additional information to the Polish authorities. Thus, according to the Supreme Court, the Court of Appeal correctly applied the principle set out in the *LM* judgment.

- **Supreme Court of Cassation, Criminal Section, VI section, 15924/2020, 21/05/2020, no. 15924, ECLI:IT:CASS:2020:15924PEN**

  On that occasion, the Supreme Court was called to rule on an appeal brought by a Polish citizen against the decision issued by the Court of Appeal of Venice and concerning the execution of an EAW issued by Polish authorities. For the first time, the Court of Cassation declared the appeal well-founded and annulled the judgement of the Court of Appeal of Venice, referring the case again to the lower court and requesting from it a more careful analysis of the rule of law situation in Poland. The applicant claimed the violation of Article 6 ECHR and Article 47 of the Charter. According to the applicant, the Court of Appeal did not correctly apply the *LM* judgment, because it did not consider the most recent judicial reforms in Poland and did not consider the relevant documents of the Venice Commission. Thus, the applicant concluded that the Court of Appeal failed to consider the risk of a breach of his right to a fair trial if he were returned to Poland. The Court of Cassation started its reasoning by recalling the key findings of the *LM* judgment and its previous case law, stressing that the executing State cannot refrain from executing an EAW solely on the basis of generic allegations of deficiencies in the judicial system of the Member State issuing the EAW. The Court of Appeal had found that the applicant had not attached specific elements proving the risk of a breach of his fundamental right to a fair trial. However, unlike its previous judgements, the Court of Cassation stressed that, after the *LM* ruling, the situation in Poland had further deteriorated due to a series of new judicial reforms. The Supreme Court recalled the judgments of the Court of Justice in the infringement proceedings brought by the Commission against Poland to stress the impairment of judicial independence. It then concluded that, in light of the new elements arisen in Poland after the judgment of the Court of Appeal, the matter needed to be re-examined by that lower court. It also stressed that the applicant should attach specific and concrete information concerning the impact on his criminal proceedings of the recent legislation adopted in Poland.

3. Future challenges

In light of the case law of both the Court of Justice and national courts, two main challenges can be identified.

First, the assessment of the second condition of the two-pronged test implies a burden of proof on the requested person which is very difficult to be fulfilled. At the same time, when there are doubts affecting the judicial system of the judicial authority that issued the EAW, it may be difficult to establish a duty of cooperation between the latter and the executing judicial authority.

Second, following the progressive deterioration of the rule of law in some Member States, the very rationale of the two-pronged test – notably, of the need to establish also an individualized risk – becomes questionable.

Case Study 2 – Assessing a position of a body in a system of judicial and quasi-judicial bodies with a view of qualifying it as a court or a tribunal under Art. 267[166]

1. The legislative framework

The concept of 'judicial authority' is not precisely defined in EU law. The reason for such partial and fragmented definition is also related to the diversity of models that are adopted in the national legal systems. There are similarities that include, in particular the respect of the autonomy and the independence (both internal and external) of the judiciary; however, the degree of autonomy and independence may differ in each country, depending also on the type of authority and the state powers involved.

A first reference able to identify the common features that characterise a court or tribunal is Art 267 TFEU. The provision concerns the preliminary ruling jurisdiction, and it provides for a useful set of criteria that should qualify the court or tribunal. The elements are the following:

1. the body is established by law;
2. it is a permanent body;
3. it has compulsory jurisdiction;
4. its procedures are *inter partes*;
5. it applies rule of law;
6. it is independent.[167]

Given that the concept of court or tribunal is an autonomous concept of EU law, it is up to the CJEU to identify in each case if the elements listed above are satisfied. [168] This obviously may also have the effect of including into the definition also several bodies that may not be formally part of the judiciaries of the Member States.

However, before dwelling into the analysis of the CJEU jurisprudence it is important to compare the wording of Art 267 TFEU and the one provided by Art 47 Charter, highlighting the different objectives of the two provisions.

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[166] Authored by Federica Casarosa, European University Institute.
[167] Case C-54/96 *Dorsch* [1997] ECLI:EU:C:1997:413, para 23.
[168] Case C-17/00 *De Coster* [2001], para 10; Case C-203/14 *Consorci Sanitari del Maresme* [2015] ECLI:EU:C:2015:664, para 17; Case C-396/14 *MT Højgaard and Züblin* [2016] ECLI:EU:C:2016:347, para 23.

Art 47 Charter reads as follows:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’

The wording therefore is not limited to administrative, civil and criminal judicial courts, given the use of the terminology of ‘tribunal’, however the CJEU never provided a specific definition of such term.

The connection between Art 267 TFEU and art 47 Charter emerges in secondary legislation as, for instance, provided for by Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status[169]. ‘It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty [now Art. 267]. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole’ (Recitals, point 27). Such connection was then applied in a few cases decided by the CJEU in different areas.

It must be underlined that the definition of court or tribunal emerges also within the ECtHR jurisprudence on the basis of arts 6 and 13 ECHR. However, where Art. 47 Charter only guarantees the right to an effective remedy before a ‘tribunal’, Art. 13 ECHR refers in general to ‘*a national authority*’. Under the ECHR system the ‘authority’ does not need necessarily to be a judicial authority, however it does need to be capable of making binding decisions.

[169] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326.

This interpretation emerges clearly in *Kudla v Poland*:

‘The Court finds nothing in the letter of Article 13 to ground a principle whereby there is no scope for its application in relation to any of the aspects of the ‘right to a court’ embodied in Article 6(1). Nor can any suggestion of such a limitation on the operation of Article 13 be found in its drafting history. Admittedly, the protection afforded by Article 13 is not absolute. The context in which an alleged violation – or category of violations – occurs may entail inherent limitations on the conceivable remedy. In such circumstances Article 13 is not treated as being inapplicable but its requirement of an ‘effective remedy’ is to be read as meaning ‘a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]’ (see the *Klass and Others v Germany* judgment of 6 September 1978, Series A no. 28, p. 31, para 69). Furthermore, ‘Article 13 does not go so far as to guarantee a remedy allowing a Contracting State’s laws to be challenged before a national authority on the ground of being contrary to the Convention’ (see the James and Others v the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 47, para 85). Thus, *Article 13 cannot be read as requiring the provision of an effective remedy that would enable the individual to complain about the absence in domestic law of access to a court as secured by Article 6(1) ECHR*.’[170] (para 151, emphasis added)

In particular, the ECtHR affirmed that the elements a national authority should have, are the following:

- Being established by law;
- Having the power to issue binding decisions;
- Being subject to rules of law (in substantive and procedural terms);
- Having full jurisdiction over the case;
- ‘Established by law’ criterion[171]

Importantly, the work of the CJEU and ordinary courts to determine the standards of judicial independence, in particular, inasmuch as the establishment and appointments procedures are concerned, will have an impact on the criterion ‘established by law’ permitting the body to refer a question to the CJEU. It remains to be seen how will this case law affect the preliminary

[170] *Kudła v Poland* App no 30210/96 (ECtHR, 26 October 2000).
[171] Case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême – nomination)* (n 125).

reference procedure given the tensions seen in the *Noble Bank* judgement (see: Casesheet No. 4 below).

- Being independent and impartial. [172]

Although the features qualifying a 'national authority' under art 13 ECHR according to the ECtHR are almost overlapping with those that characterise a 'tribunal' according to Art 267 TFEU, the latter seems to be interpreted in a more stringent way by the CJEU. However, similarly to the case-by-case approach adopted by the ECtHR, the jurisprudence of the CJEU shows that it is not excluded, in principle, that the concept of 'tribunal' may include also bodies that are not courts.

2. Trends in the jurisprudence of the CJEU

As a preliminary procedural step in the presentation of a preliminary ruling, the CJEU assesses whether or not the body presenting the claim can be qualified as a court or tribunal.

Since 1966, with the Case C-61/65, *Vaassen-Göbbels* (ECLI:EU:C:1966:39), the CJEU takes into account 'a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent' in order to determine if the body making a preliminary reference is a 'court or tribunal'. The same reasoning emerged also in *Umweltanwalt von Kärnten*, C-205/08 (ECLI:EU:C:2009:767, para 35) and in *Consorci Sanitari del Maresme*, C-203/14 (ECLI:EU:C:2015:664, para 17).

From the jurisprudence of the CJEU some clear guidelines are emerging:

- Arbitral bodies are excluded from the application of Art. 267 TFEU, as they are established on the basis of an agreement between the parties and not by law, though doubts can emerge in case of arbitral tribunals directly and intentionally set up by Member States through inter se agreements (Case C-125/04, *Denuit and Cordenier*[173]).
- administrative bodies exercising functions of an administrative nature bodies with an advisory task and audit offices are not courts or tribunals.

[172] For an analysis of art 13 ECHR guarantees see also FRA, Handbook on Access to justice, p 30 ff.
[173] Case C-125/04 *Denuit and Cordenier* [2005] ECLI:EU:C:2005:69.

- national bar councils[174] or independent authorities may instead be qualified as tribunals, if they comply with the mentioned elements, and in particular those of independence and impartiality.[175]

It must be underlined that, among the criteria evaluated by the CJEU, the element of independence weights more than others, such as *inter partes* condition.

The criterion of judicial independence

As it was outlined in the introductory section, the concept of *judicial independence* entails two dimensions: an internal and an external one. According to the internal dimension, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. In other words, independence requires courts to be impartial and free from bias flowing from personal interests in the outcome of the proceedings.

According to the external dimension, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them (as developed in C-506/04 *Wilson,* paras 49 – 52[176]). Accordingly, any hierarchical constraint or subordination to any other body would be incompatible with the idea of independence.

For instance, in Case C-503/15 *Panicello*,[177] the CJEU addressed in detail the features of the Secretario Judicial, who presented the preliminary ruling, in order to verify if it was entitled to be qualified as 'tribunal'. The Secretario Judicial, under Spanish law, decides the claims for the recovery of legal fees. Although the CJEU affirmed that the internal dimension of independence was ensured by the Secretario Judicial, the lack of independence of the deciding body and the fact that the jurisdiction lacked a mandatory feature, did not satisfy the external dimension of independence. Therefore, the procedure before the Secretario was deemed more as an administrative procedure than in a judicial one.

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[174] Case C-58/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata (Torresi)* [2014] EU:C:2014:2088, paras 20-25.
[175] See Case C-506/04 *Wilson,* op. cit. (n 80) and Case C-517/09 *RTL Belgium* [2010] EU:C:2010:821.
[176] C-506/04 *Wilson* (n 80).
[177] Case C-503/15, *Ramón Margarit Panicello v Pilar Hernández Martínez* [2017] ECLI:EU:C:2017:126.

The CJEU jurisprudence leads to affirm that if an authority entrusted with the power to issue decisions aimed to solve disputes is not independent, because it is part of organisations subject to an administrative hierarchy headed by a political body, said authority is not a 'judiciary' for the purposes of requesting a preliminary ruling to the Court pursuant to article 267 TFEU.

However, in Case C-272/19, *VQ v Land Hessen*, where the Administrative Court of Wiesbaden presented a preliminary ruling as regards its position as an independent court or tribunal for the purposes of Article 47 CFR and Article 267 TFEU. The CJEU assessed the elements provided by the referring court, affirming that it has no evidence as regards '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 impact of the classification of a court or a tribunal on mutual recognition

The notion of court or tribunal is essential under a different perspective, namely the qualification of the bodies whose decisions qualify for mutual recognition. For this reason, the concept of a 'court' must be construed in the light of the principle of mutual trust. Just like in the context of Article 267 TFEU, this means, in essence, that the notion of court within the AFSJ requires the body in question to be impartial and independent, as mandated by the *Pula Parking* (judicial cooperation in civil matters)[178] and *Baláz* (judicial cooperation in criminal matters)[179] cases.

The interplay between Art 267 TFEU and art 47 Charter

Although the CJEU assessed the qualification of the court or tribunal as such, such analysis is to be interpreted as an institutional evaluation. This distinction is relevant under two perspectives: first when the interplay between art 47 Charter and art 267 TFUE is addressed, and second when the CJEU is asked to extend the assessment to the individuals that are part of the institutions.

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[178] Case C-551/15 *Pula Parking,* op. cit. (n 69)
[179] Case C-60/12 *Baláž*, op. cit. (n 70).

Under the first perspective, the analysis under Article 267 TFEU has always been concerned merely with identifying the proper institutional interlocutors for the Court, not with the lawfulness of each and every element of the procedure pending before the referring court (Advocate General's Opinion in Case C-132/20 *Getin Noble Bank* (ECLI:EU:C:2021:557)). The connection with art 47 Charter is made by the CJEU as a matter of implementation of the right to an effective remedy under EU law: the individual parties may not be deprived of their right to have the relevant EU provisions applied correctly in the proceedings.

For instance, in Case C-464/13, *Europäische Schule München*, the CJEU addressed if the Complaint board of the Schule can be qualified as a tribunal and verified the existence of the specific features, allowing the Court to affirm that the *exclusive jurisdiction of a non-judicial body* 'does not adversely affect the right of the interested parties to effective judicial protection'.[180] Then, the CJEU linked such analysis to one additional features provided by art 47 CFREU, namely the right of access to a second level of jurisdiction, which could be interpreted as this provision applies also to such bodies.

Under the second perspective, the CJEU is ill-equipped to carry out an assessment of the impartiality and moral integrity of specific judges at national level in the form of an admissibility assessment under Article 267 TFEU, as a detailed and in-depth examination would need to take place at the stage of admissibility leading to circular analysis of provisions.[181]

[180] See Case C-464/13 *Europäische Schule München* [2015] ECLI:EU:C:2015:163, para 71.
[181] See Opinion of AG Bobek in Case C-132/20 *Getin Noble Bank* (n 90) para 69.

Casesheet No 1 – CJEU, Case C-503/15, Ramón Margarit Panicello v Pilar Hernández Martínez

Reference for preliminary ruling: Secretario Judicial del Juzgado de Violencia sobre la Mujer Único de Terrassa in case: Ramón Margarit Panicello v Pilar Hernández Martínez

Core issues
Is the Secretario Judicial – in charge of the extrajudicial procedure for the recovery of unpaid legal fees – a tribunal or a court pursuant to art 267 TFEU?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
•Spain	• independence	•art 47 Charter •Art 267 TFEU	•Secretario judicial •CJEU	• preliminary ruling •consistent interpretation

Case(s) description

a. Facts

Ms. Hernández Martínez (the client) had engaged the services of a lawyer, Mr. Margarit Panicello (the lawyer), to represent her in proceedings about the custody of her children. Unfortunately, after the proceedings had ended, a dispute arose over the amount owed by the client to the lawyer. It appeared that the lawyer had failed to inform the client of the estimated costs of his services. The lawyer brought an action against the client for the recovery of legal fees before the *Secretario Judicial* at the court seized of the matter those fees had been incurred in. The extrajudicial procedure at issue ('*jura de cuentas*') is intended to ensure the rapid determination of the enforceability of specific legal fees, when it can be demonstrated that the claim is well-founded.

The *Secretario Judicial* had **doubts** whether the applicable procedural rules are compatible with Directives 93/13 and 2005/29, and Article 47 of the Charter in so far as they (i) do not allow the *Secretario Judicial* to verify *ex officio* whether there were any unfair terms or unfair commercial practices, (ii) restrict the possibility for the client to produce evidence to contest the amount claimed by the lawyer, and (iii) result in a decision that may not subject to appeal but enables the lawyer to request enforcement immediately. During the '*jura de cuentas*', it is not possible for the client either to lodge a suspensory objection based on the (alleged) existence of unfair contract terms.

b. Reasoning of the CJEU

The CJEU, however, held that the *Secretario Judicial* is not a 'court or tribunal' for the purposes of Article 267 TFEU. Therefore, it had **no jurisdiction** to rule on the *Secretario Judicial*'s request for a preliminary ruling.

The CJEU did not addressed all the criteria, but rather it focused on the issue of independence.

The CJEU finds that the Secretario Judicial satisfies the internal aspects of independence (i.e. objectivity and impartiality as regards the parties and their respective interests), but not the external aspects: the Secretario Judicial is a civil servant and answerable to the Minister of Justice.

Note that the AG did not support this argument as she argued that, despite their status as civil servants rather than members of the judiciary, Secretarios Judiciales exclusively act in accordance with the competences conferred to them by law. Their employer may not exert any influence over ongoing proceedings or issue instructions in relation to specific cases.

Moreover, the CJEU also relied on the fact that the jurisdiction was not compulsory: the conflicts are purely ancillary and discretionary, as they (may) emerge after the original court proceedings ended.

Analysis

a. Role of the fundamental rights

The Charter was not mentioned nor analysed.

b. Judicial dialogue

The CJEU relied on its own jurisprudence in assessing the internal and external dimensions of independence, citing in particular judgments of 19 September 2006, Wilson, C-506/04, EU:C:2006:587; 9 October 2014, TDC, C-222/13, EU:C:2014:2265; 6 October 2015, Consorci Sanitari del Maresme, C-203/14, EU:C:2015:664, 17 July 2014, Torresi, C-58/13 and C-59/13, EU:C:2014:2088.

Casesheet No 2 – CJEU, Case C-272/19, VQ v Land Hessen & Administrative Court of Wiesbaden follow up

Reference case

Administrative Court of Wiesbaden, 6th Chamber, Judgement of 31/08/2020, DE:VGWIESB:2020:0831.6K1016.15.WI.00

TRIIAL Database: https://cjc.eui.eu/data/data/data?idPermanent=108&triial=1

Core issues
Can the Court of Wiesbaden qualify as a court or tribunal within the meaning of EU law since the court is subject to the decisions of the executive as regards matter of data protection?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
•Germany	• independence	•art 47 Charter •Art 267 TFEU	•lower court •CJEU	• preliminary ruling •consistent interpretation

Case(s) description

a. Facts

The applicant submitted a petition to the Petitions Committee of the Parliament of Land Hessen, he/she applied to that committee, on the basis of Article 15 of Regulation 2016/679, for access to the personal data concerning him, recorded by that committee when dealing with his petition. Since the President of the parliament of Land Hessen decided to reject that application, he brought an action before the administrative court and challenged this decision. In this regard, the Verwaltungsgericht Wiesbaden asked the CJEU whether it itself can be considered to be a 'court or tribunal', within the meaning of Article 267 TFEU, read together with Article 47(2) of the Charter, in the light of the criteria set out by the Court in that regard, in particular the criterion pertaining to the independence of the body concerned. In fact, the

administrative court is functionally connected to the executive, namely the Ministry of Justice of Wiesbaden. This is because the judges are appointed and promoted by the Minister of Justice; the appraisal of judges is undertaken by the Ministry of Justice according to the same rules as applicable to public officials; the personal data and professional contact details of the judges are managed by that ministry, which thus has access to that data, and because to cover temporary staff requirements, public officials can be appointed as temporary judges; as well as because the Minister of Justice prescribes the external and internal organisation of the courts or tribunals, determines the allocation of staff, means of communication and IT facilities of the courts or tribunals and also decides on the work-related travel abroad undertaken by the judges.

b. Reasoning of the CJEU

The final judgement was delivered in light of the preliminary ruling issued by the CJEU, which affirmed that the factors mentioned by the Administrative Court of Wiesbaden in support of the doubts relating to its own independence cannot, in themselves, be sufficient ground for a conclusion that those doubts are well-founded and that that court is not independent, and that therefore the Administrative Court can be considered to constitute a 'court or tribunal', within the meaning of Article 267 TFEU.

Moreover, the CJEU also relied on the fact that the jurisdiction was not compulsory: the conflicts are purely ancillary and discretionary, as they (may) emerge after the original court proceedings ended.

c. Outcome of the decision

The Court affirmed that in its decision of 9 July 2020 (Case C 272/19), the CJEU evidently assumes the independence of the judge as it results from Article 97 (1) of the Basic Law, when it ultimately only refers to the independence of the referring judge, whom it describes as the 'President of the Wiesbaden Administrative Court' (para 49 of the preliminary ruling). The referring judge assumes in this respect that the CJEU is thus referring to the independence of the court as a judicial body - in this case, the referring judge - and not to institutional independence. The CJEU affirms the former, which is why it regards this question for a preliminary ruling as inadmissible and answers the core question.

In this respect, the European Court of Justice must be granted that the single judge called upon to rule - even if 'only' as presiding judge - has the necessary imperviousness to outside influence and neutrality with regard to the interests of the parties (para 59 of the preliminary ruling). This ' insensitivity' is already based on the judicial ethos of the presiding judge, but it does not exclude an overall influence of the executive on the court as an organ. This is especially true when the single judge is not the president.

The Court affirmed that it may be left open in this respect whether the court called upon to rule is an independent and impartial court within the meaning of Article 276 TFEU in conjunction with Article 47 (2) of the Charter. Finally, the Court concluded that at the very least, the judge called upon to rule considers himself/herself to be independent from the parties to the proceedings within the meaning of Article 97 (1) of the Basic Law, in accordance with the narrow interpretation of the CJEU.

Analysis

a. *Role of the fundamental rights*

The EU Charter was invoked as the relevant parameter for establishing whether the Court qualified as a court or tribunal. Indeed, in the follow up decision the Administrative Court evaluated the compatibility of the national system and the connection to the executive with EU law in light of Article 47(2) of the Charter. In doing so, the Court elaborated on Articles 47 CFR and Articles 267 TFEU, as well as implicitly taking into consideration the relevant case-law.

b. Judicial dialogue

The Administrative Court of Wiesbaden engages in external vertical judicial interaction with the CJEU.

Casesheet No 3 – CJEU, Case C-551/15, Pula Parking

Reference case

Core issues Are notaries qualified are judicial authorities pursuant Brussels I regulation?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
• Croatia	• independence	• Brussels I regulation	• notaries • CJEU	• preliminary ruling

Case(s) description

a. Facts

Pula Parking is a company that carries out the administration, supervision, maintenance and cleaning of the public parking spaces, the collection of parking fees and other related tasks. After a client, domiciled in Germany, did not settle the parking fees, Pula Parking lodged an application for enforcement on the basis of an 'authentic document' with a notary office. A notary issued a writ of execution. The client opposed to the writ of execution on the ground that that notary did not have jurisdiction to issue such a writ on the basis of an 'authentic document'.

b. Reasoning of the CJEU

The ECJ noted that in the absence of any reference to the law of the Member States, the notion of 'court' had to be interpreted autonomously, taking into account the overall scheme, the objectives and the origin of the new Brussels I Regulation. Since the Regulation sought to facilitate the mutual recognition of judicial decisions in civil and commercial matters as if those decisions had been delivered in the Member State in which enforcement is sought, the MS of enforcement shall treat judicial decisions from other Member States as if they were its own (para 42, 52)

‘the concept of ‘court’ under the new Brussels I Regulation must be interpreted as taking account of the need to enable the national courts of the MS to identify judgments delivered by other MS’ courts and to proceed, with the expeditiousness required by that regulation, in enforcing those judgments’ Thus, in the key passage of that judgment, the ECJ wrote that ‘compliance with the principle of mutual trust in the administration of justice in the Member States of the European Union which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in another Member State have been delivered in court proceedings offering guarantees of independence and impartiality and in compliance with the principle of *audi alteram partem*’ (para 54)

However, this was not the case for Croatian notaries, whose writ fails to comply with the principle of *audi alteram partem*, and as such they could not be seen in this context as ‘courts’ within the meaning of the new Brussels I Regulation.

Casesheet No 4 – CJEU, Case C-132/20 Getin Noble Bank

Reference case

Core issues
Is a judge, who sits as a single judge in the Sąd Najwyższy (Supreme Court) and reviews the admissibility of appeals brought before that body, a 'court or tribunal' for the purposes of the autonomous definition of such a body under Article 267 TFEU?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
•Poland	• independence	•Art 267 TFEU	•individual judge •CJEU	• preliminary ruling

Case(s) description

a. Facts

The request for a preliminary ruling comprises seven questions posed by a single member of the Civil Chamber of the Supreme Court. They concern, inter alia, the independence and impartiality of a court sitting with a judge still appointed by the Council of State of the People's Republic of Poland or selected by the former National Council of the Judiciary.

The referring court asks whether an independent and impartial court with appropriate qualifications within the meaning of European Union law is a body containing a person appointed to the office of judge by a political executive body of a state with a totalitarian, non-democratic, communist system of power.

b. Reasoning of the AG

The AG distinguished the analysis of the criteria for the assessment of the qualification of the individual judges as a court or tribunal.

First, is the court or tribunal 'established by law'? The AG clarifies that this element should be assessed in relation to the *body* itself, and not in relation to the *individuals* who sit in the body

which made the request. Moreover, he stresses that within Article 267 TFEU, the concept of ‘court or tribunal’ has a functional nature: it serves to identify the national bodies which – in so far as they exercise judicial functions – can become the interlocutors of the Court in the context of a preliminary ruling procedure. The preliminary ruling procedure established judicial cooperation between courts, not between individual persons. Accordingly, the legal analysis of its actors must necessarily be focused on structural, institutional issues. What is crucial, in that respect, is the nature, position and functioning of that body within the Member States' institutional framework.

As a corollary, the analysis is not meant to verify whether specific individuals who belong to that institution and sit in the formation of the court which made the reference fulfil, each of them individually, the criteria set out in Article 267 TFEU.

Finally, the AG differentiates the purpose of Article 47 Charter from the one of Article 267 TFEU: the latter aims at identifying the appropriate judicial interlocutors in terms of bodies in a Member State which may refer a question to the Court of Justice, whereas the former at detecting breaches of the lawful composition of the bench in each individual case in order to protect individual EU law-based rights.

Secondly, is the court independent? The CJEU jurisprudences emphasises the fact that the body presenting a preliminary reference is structurally independent from both the parties in a dispute before it as well as from any external guidance, such as that body being institutionally part of the administration. Moreover, the Court is ill-equipped to carry out an assessment of the impartiality and moral integrity of specific judges at national level in the form of an admissibility assessment under Article 267 TFEU, as a detailed and in-depth examination would need to take place at the stage of admissibility leading to circular analysis of provisions.

Case Study 3 – Defending the position of a singular judge – Disciplinary measures, Freedom of expression of judges & Irremovability from the office[182]

1. The legal framework

In this section we deal with the case study of a singular judge making recourse to the professional safeguards in order to defend his own position. This can be spoken of in the context of both the irremovability of a judge as well as standards applicable to disciplinary proceedings as well as freedom of expression relating to the exercise of the function of a judge. Whereas the systemic challenges to the two will be addressed in Case Study 4 below, in this part, we will focus on freedom of expression as well as the instances where individual judges seek recourse from the European Courts to aid their position in a given jurisdiction of the Member States.

1.1 Freedom of expression of judges

According to a strict interpretation of the principle of tripartition of the powers of the State, the judge speaks through her decisions. This interpretation entails two limits to the judges' freedom of expression: an external limit, or *rectius* safeguard, defending each power from the possible undue interferences coming from the others (e.g., judiciary over executive power). Then, an internal limit guaranteeing that the judge, when she speaks through decisions, must not be subjected to any kind of conditioning by other powers (e.g., executive power over the judiciary). This limit, therefore, safeguards judge's discretion when, in the exercise of her functions, she is called upon to interpret the law and to make her own determinations, provided that it is a matter of hermeneutical choices whose logic is recognisable in a coherent and exhaustive argumentative structure.

From a different perspective, then, the judge as an individual has the right to express opinions and thoughts. As a matter of fact, Art 10 ECHR and Art 11 Charter guarantee such freedom, however, when the individual is a judge her ability to express opinions and thoughts can be limited due to the obligations that emerge from the role she plays in the legal system. The

[182] Authored by Federica Casarosa (European University Institute) and Karolina Podstawa, (University of Maastricht).

limitations to judges' freedom of expression are based on two main grounds: the interest of judicial independence and the authority of the judiciary.

The principle of independence of the judiciary is to be understood both in a functional sense (i.e., as the status of the judge considered *uti singulus* in the exercise of his functions) and in an institutional sense (i.e. with reference to the judicial system as a whole). In the former, the independence is to be qualified as internal, whereas in the latter as external, where emerges again the prohibition of interference by other authorities.

The principle of impartiality is essential in a democratic and liberal system, ensuring that the judge plays as a third party in the resolution of disputes. The feature of impartiality is not only to be recognised in the substantial organisation of the judicial system, but it must also be apparent to the citizens: i.e. a judge is not only required to be impartial, but also to appear so. Accordingly, a judge is prohibited from any form of manifestation of thought which, in terms of content or manner of expression, undermines or risks undermining (even) the appearance of impartiality.

1.2 Procedural paths for the defence of a judicial position

What is visible in the case law across jurisdictions is that individual judges design further recourses to aid their legal situations both nationally and internationally and to assess better their own system of administration of justice.

From the European and national perspectives one can distinguish the following paths; each of which has certain advantages and pitfalls:

A. Staying proceedings irrelevant from the perspective of the standard of judicial independence and impartiality thereby referring the case to the CJEU.

Example: *Miasto Łowicz and Prokurator Generalny*[183], but also *Getin Nobel Bank*[184]

Advantages: the relatively quick reaction from the EU level, especially if individuals concerned

[183] Case C-563/18, *Miasto Łowicz and Prokurator Generalny (Miasto Łowicz)* (n 15).
[184] Case C-132/20 *Getin Noble Bank* (n 95).

Potential problems: lacking connection between the preliminary question and EU law, potentially leaving out the case from jurisdiction of CJEU (as in *Miasto Łowicz*[185])

B. As a party to national proceedings, making a claim using the prescribed paths, which may also lead to the use of preliminary reference procedure.

Examples: C-487/19 *W. Ż*[186]

Potential problems: the need for individual engagement in proceedings

C. As a party in national disputes offering making a reference to ECtHR once national remedies are exhausted.

Examples: *Tuleya v Poland*[187], *Broda and Bojara v Poland*[188], *Grzęda v Poland*[189], but also *Filippini v San Marino*[190]

Potential problems: length of proceedings (though arguably addressed given the decision as to prioritising the set of cases).

2. Trends in the jurisprudence of the CJEU and ECtHR

2.1 Freedom of expression of judges

Freedom of expression of judges has been analysed widely by the ECtHR, whose jurisprudence set accurate standards that connect freedom of expression with the principles of impartiality and independence.

In the case of *Wille v Liechtenstein*[191] the ECtHR address whether the limits imposed on the judiciary are necessary, and therefore lawful, in the light of art 10 ECHR. In particular the ECtHR affirms that 'Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention.' However, '[T]he 'duties and responsibilities'

[185] Case C-563/18, *Miasto Łowicz and Prokurator Generalny (Miasto Łowicz)* (n 15).
[186] Case C-487/19 *W. Ż. () and des affaires publiques de la Cour suprême – nomination)* (n 125).
[187] *Tuleya v Poland* App no 21181/19 (lodged 10 April 2019).
[188] *Broda and Bojara v Poland* App no 26691/18 and 27367/18 (ECtHR, 29 June 2021).
[189] *Grzęda v Poland* App no 43572/18 (ECtHR, 15 March 2022).
[190] *Filippini v San Marino* App no 10526/02 (ECtHR, 26 August 2003).
[191] *Wille v Liechtenstein* App no 28396/95 (ECtHR, 28 October 1999).

referred to in Article 10 para 2 assume a special significance since it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question.'

In case *Albayrak v Turkey* the ECtHR addressed the effects that the exercise of freedom of expression has on the judicial office. Where the opinions expressed by the judge do not have any bearing on the performance judicial activity or on judicial impartiality, then the ECtHR recognise the violation of art 10 ECHR.[192]

The forms and manners in which the opinion is expressed by the judge has also an important weight in the evaluation of the ECtHR: in *Di Giovanni v Italy*[193] the Court acknowledged that the expressions used by the judge showed insufficient restraint and respect, however, the specific case required a subsequent evaluation of the sanction imposed on the judge. As a matter of fact, the ECtHR's analysis takes into account also the potential chilling effect that can be triggered by the sanctions imposed. This was confirmed in *Kayasu v Turkey*[194]where the Court affirmed that the dismissal of a prosecutor was not proportionate to the aim of maintaining the authority and impartiality of the judiciary. The ECtHR viewed this effect as detrimental to society, since it affected the confidence of the public in the ability of judicial officials to do what is necessary to maintain the rule of law.

It should be noted that the Grand Chamber judgement in *Baka v Hungary*[195] the ECtHR addressed the case of the premature termination of judge Baka's mandate as President of the Supreme Court after the latter expressed a negative opinion over the legislative proposal for a reform of the national judicial system. Here, the Grand Chamber acknowledged the causal link between the exercise of the freedom of expression and the termination of the mandate. Then, it evaluated that the expression was a personal opinion that contributed to a matter of public interest, therefore, the Court concluded that the case 'called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.'

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[192] *Albayrak v Turkey* App No 38406/97 (ECtHR, 31 January 2008).
[193] *Di Giovanni v Italy* App No 51160/06 (ECtHR 9 July 2013).
[194] *Kayasu v Turkey* App No 64119/00 and 76292/01 (ECtHR, 13 November 2008).
[195] *Baka v Hungary* App No 20261/12 (27 May 2014, GC 23 June 2016).

The ECtHR dealt also with cases involving judges expressing their opinions in the press. For instance, in *Olujić v Croatia*[196] the complaints concerned statements by judges in newspapers about cases they were hearing at the time or which had already been heard by them. In this case the ECtHR affirmed that 'the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty.'

As a matter of fact, when the ECtHR strikes a balance between art 10 and art 6(1) ECHR, it affirms that the exercise of freedom is only limited when there are facts that give rise to doubts about the judge's independence and impartiality from the subjective or the objective point of view. Only when the opinions and convictions of the judge are present in the form of a noticeable prejudice or bias or when the activities have a specific connection with the parties, or the case matter can Article 6(1) ECHR be violated.

From the CJEU perspective, the jurisprudence addressing the freedom of expression of judges is almost non-existent. However, the most recent cases allow to add a feature to the scope of judges' freedom of expression, namely the freedom to refer preliminary questions as a (EU specific) component of judges' freedom of expression. Under this perspective, the CJEU's decision in Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*[197] is crucial.

According to the Court, the mere opening of investigations concerning decisions whereby Polish ordinary courts have submitted requests for a preliminary ruling is incompatible with EU law. In particular, the CJEU affirms that

'227 Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot therefore be permitted. Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is **likely to undermine the effective exercise by the**

[196] *Olujic v Croatia* (n 61), paras 59-60.
[197] Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)* (n 70).

national judges concerned of the discretion and the functions referred to in paragraph 225 of the present judgment.

228 For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence'.[198]

2.2 Defending a position of a singular judge

A. Staying proceedings irrelevant from the perspective of the standard of judicial independence and impartiality and referring the case to the CJEU.

C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, [2020] ECLI:EU:C:2020:234

The two preliminary reference procedures initiated by two Polish judges without a clear connection to EU law, therefore ultimately declared inadmissible by the CJEU due to their hypothetical character. The questions did not, therefore, 'concern an interpretation of EU law which meets an objective need for the resolution of those disputes, but are of a general nature'.

The judges have sought guidance from the CJEU as to whether the new regime for disciplinary proceedings against judges in Poland is in line with the requirements of judicial independence under Article 19(1) TEU. The government of Poland argued that rules on disciplinary proceedings against judges fall within the competences of the Member States, and for this reason, EU law does not apply to their assessment. Furthermore, the Polish government adds that the CJEU's reply is not necessary to resolve the disputes in the main proceedings, as they have nothing to do with the disciplinary regime in Poland (the referring judges are not currently subject to any disciplinary proceedings).

In line with Attorney General Tanchev's opinion, the CJEU declared the claims nonetheless inadmissible for the lack of necessity in light of the original dispute. Furthermore, the CJEU noted that the proceedings have since been closed on the ground that no disciplinary misconduct was proven.

[198] *Idem,* paras 227-228.

Whereas declared inadmissible, the case *Miasto Łowicz* offers an insight into, on the one hand, a certain strategy taken on by a judge to warranty her own independence, and on the other, illustrates the opportunity that the CJEU may wish to take to assess the abstract principles in case. And so, even though the case was found inadmissible, the CJEU did pronounce that: 'Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot therefore be permitted. Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions [..]'[199]

B. As a party to national proceedings, making a claim using the prescribed paths, which may also lead to the use of preliminary reference procedure.

For more, see examples in Case Study 4, Constellation 1

C. As a party in national disputes making a reference to ECtHR once national remedies are exhausted.

There are numerous cases pending before ECtHR at the moment and decided by ECtHR in recent years concerning the position of individual judges. From *Baka v Hungary*[200] through the series of Polish cases, to *Ástráðsson v Iceland*[201] , each of the cases brought a piece of a puzzle to specify what would be the desirable standard of judicial independence, impartiality, and accountability. Below we give two lesser-known examples of how individuals challenge measures affecting their position before ECtHR, as well as the results of such activities.

Case Ramos Nunes de Carvalho e Sá v Portugal, Application No. 55391/13 (6 November 2018) concerning disciplinary proceedings

This case concerned disciplinary proceedings brought against a judge, resulting in the imposition of disciplinary penalties by the High Council of the Judiciary ('CSM'), and the review conducted by the Supreme Court on appeal. The applicant alleged faults in proceedings against him as well as problems with the guarantees of independence, impartiality and

[199] C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*, [2020] EU:C:2020:234, para 58.
[200] *Baka v Hungary* (n 198).
[201] *Guðmundur Andri Ástráðsson v Iceland* (n 39).

accountability applicable to the Supreme Court and the High Council of the Judiciary. The ECtHR found a violation of Art. 6(1) ECHR finding the shortcomings of the conduct in proceedings against the applicant, however, no violation of Art. 6 occurred, inasmuch as guarantees of independence and impartiality of the Supreme Court were concerned (the plea against the High Council of the Judiciary was declared inadmissible).

The applicant submitted in particular that there were objective reasons to doubt the independence and impartiality of the Judicial Division of the Supreme Court. She argued, *inter alia*, that the President of the CSM was also the President of the Supreme Court and that in the latter capacity, he or she appointed each year the members of the ad hoc division that examined appeals against the CSM's decisions in disciplinary cases.

The Court held that there had been no violation of Article 6(1) of the Convention with regard to the complaint alleging a lack of independence and impartiality on the part of the Judicial Division of the Supreme Court. It considered, in particular, that the dual role of the President of the Supreme Court was not such as to cast doubt on the independence and objective impartiality of that court in ruling on the applicant's appeals against the CSM's decisions. Furthermore, with a due regard to all the specific circumstances of the case and to the guarantees aimed at shielding the Judicial Division of the Supreme Court from outside pressures, the Court found that the applicant's fears could not be considered as objectively justified, and that the system in place for reviewing disciplinary decisions of the CSM, namely an appeal to the Judicial Division, did not breach the requirement of independence and impartiality under Article 6(1) ECHR.

As far as the proceedings against the applicant were concerned, the ECtHR found the violation of Art. 6(1) ECHR based on the analysis of the specific context of disciplinary proceedings conducted against a judge, the seriousness of the penalties, the fact that the procedural guarantees before the CSM had been limited. In addition, the ECtHR took into the account factual evidence going to the applicant's credibility and that of the witnesses as well as the fact that there was no hearing neither at the stage of the disciplinary proceedings, nor at the stage of judicial review – these collectively have contributed to the finding of violation of Art. 6(1) ECHR in relation to disciplinary proceedings.

The Context of the Polish Reforms – pending cases originating from judges and lawyers

The procedural path of reliance on the ECtHR to pronounce itself on the standard of judicial independence, impartiality and accountability has been taken by many of Polish judges. In particular, the following cases focused on multiple aspects of Polish reforms: Broda v Poland and Bojara v Poland (nos. 26691/18 and 27367/18),[202] Żurek v Poland (no. 39650/18)[203] and Sobczyńska and Others v Poland (nos. 62765/14, 62769/14, 62772/14 and 11708/18)[204], and Tuleya v Poland (no. 21181/19)[205].

[202] Applications communicated to the Polish Government on 2 September 2019. This case concerns the changes to the Polish judiciary, which had the effect of entailing the premature discontinuance of the 6-year terms of office of the applicants, two judges who had been appointed as vice-presidents of Kielce Regional Court. Both applicants complain that they were dismissed from their posts without having a judicial remedy by which to challenge their allegedly arbitrary and unlawful dismissal.

[203] Application communicated to the Polish Government on 14 May 2020 This case concerns the premature termination of a judge's mandate as a member of the National Council of the Judiciary ('NCJ'), the constitutional organ in Poland which safeguards the independence of courts and judges, his dismissal as spokesperson for that organ, and the alleged campaign to silence him. The applicant alleges in particular that he was denied access to a tribunal and that there was no procedure, judicial or otherwise, to contest the premature termination of his mandate.

[204] Applications communicated to the Polish Government on 14 May 2020. This case concerns the Polish President's refusal to appoint the applicants to vacant judicial posts in various courts in Poland. The applicants argue that they met the legal conditions in force at the relevant time, and complain about the administrative courts' and the Constitutional Court's refusal to examine their appeals, declining jurisdiction in that sphere. The Court gave notice of the applications to the Polish Government and put questions to the parties under Article 6(1) (right to a fair trial), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) ECHR.

[205] Judge Tuleya in the context of disciplinary regime of judges accuses the Polish government of, inter alia, breaching his right to private life and his reputation in connection with disciplinary proceedings against him and summoning him as a witness in disciplinary proceedings against other judges in 2018 (events after 2018 are not included in the application).

The Court gave notice of the application to the Polish Government and put questions to the parties under Article 8 (right to respect for private life), Article 13 (right to an effective remedy) and Article 10 (freedom of expression) of the Convention. The ECtHR noticed the broader context of the disciplinary proceedings against Tuleya and other judges in Poland: since the model of disciplinary liability for judges changed in 2018, disciplinary proceedings have been initiated against judges in Poland in connection with their judicial activity and because they have been speaking up in a public debate, especially if the judges criticized the changes in the judiciary. It also noted that a slanderous campaign was being conducted against Judge Tuleya in the media, insulting him and attempting to discredit him and that the judge was receiving hate messages.

Casesheet No. 5 –Freedom of expression of judges and mandate's termination

Reference case

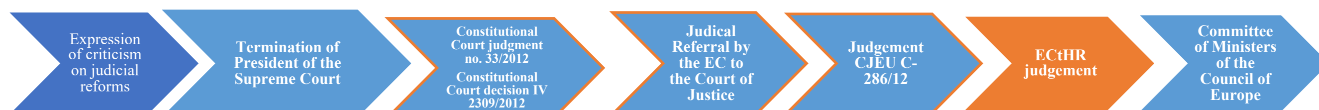
European Court of Human Rights, Baka v Hungary, Application No. 26261/12, Judgment of 27 May 2014 (Grand Chamber 23 June 2016)[206]

Core issues
Early termination of the former President of the Hungarian Supreme Court for having criticized constitutional and legislative reforms.

At a glance

Country	Area	Reference to ECHR law	Legal and/or judicial body	Judicial InteractionTechnique	Remedy
• Hungary	• Early dismissal of judges • Right to a fair trial • Freedom of Expression	• Article 6 • Article 10	• European Court of Human Rights (Grand Chamber)	• Consistent interpretation	• In light of the violation of art. 6 and art. 10 ECHR, written observation and notification to the Court of any agreement between the Government and the application

Timeline representation



Case(s) description

a. Facts

On 22 June 2009 Mr. Baka was appointed as President of the Supreme Court for a six-year term until 22 June 2015. He was also President of the National Council of Justice, carrying out managerial and judicial tasks. As the head of the National Council of Justice, the applicant was under an explicit statutory obligation to express an opinion on parliamentary bills that affected the judiciary, after having gathered and summarised the opinions of different courts via the Office of the National Council of Justice. In April 2010 Fidesz and the Christian Democratic

[206] Casesheet drafted by Dr. Mariavittoria Catanzariti, European University Institute. The case is also commented in a recorded video available in TRIIAL Course 5 in the apogee platform.

People's Party put in place a programme of structural constitutional reforms affecting the judiciary. In his capacity as President of the Supreme Court and the National Council of Justice, in several occasion Mr. Baka expressed his criticism in the press and in Parliament on different aspects of the reforms.[207]

Following to the constitutional reform, the applicant's mandate as President of the Supreme Court was terminated on 1 January 2012, three and a half years before its expected date of expiry. This was possible thanks to the introduced reformsreform. The Fundamental Law of 25 April 2011 established that the highest judicial body would be the Kúria. After this, several amendments were submitted to the Constitution, in particular the one under which the Parliament must elect, by 31 December 2011 and according to the rules laid down in the Fundamental Law, the President of the Kúria who is to take office on 1 January 2012. Additionally, the Transitional Provisions of the Fundamental Law provided that the legal successors of the Supreme Court and the National Council of Justice would be the Kúria, for the administration of justice, and the President of the National Judicial Office, for the administration of the courts, and that the mandates of the President of the Supreme Court and of the President and members of the National Council of Justice would be terminated upon the entry into force of the Fundamental Law.

The early termination of Mr. Baka's mandate implied the loss of remuneration and other benefits to which he was no longer entitled under the new rules.

[207] The following aspects of judicial independence were addressed in critique of Mr. Baka: the legislative reforms affecting the judiciary, notably the Nullification Bill, the retirement age of judges, the amendments to the Code of Criminal Procedure, and the new Organisation and Administration of the Courts Bill. In particular he expressed concern about the unconstitutionality of the Bill ordering the annulment of final convictions and violating the right of the Judge to freely assess evidence; the proposed constitutional reform which concerned the judiciary, notably the new name given to the Supreme Court – Kúria –, the new powers attributed to the Kúria in the field of ensuring consistency in the case-law, the management of the judiciary and the functioning of the National Council of Justice, as well as the introduction of a constitutional appeal against judicial decisions; the proposal to reduce the mandatory retirement age of judges (from seventy years to the general retirement age of sixty-two) and to modify the model of judicial self-governance embodied in the National Council of Justice; the serious threat to judicial independence and the principle of irremovability, and non-discrimination principle as only judiciary was involved; the unconstitutionality of two Bills, one on the organisation and administration of the courts and the other on the legal status and remuneration of judges, providing for the separation between managerial and judicial functions which had been 'unified' in the person of the President of the Supreme Court, who was at the same time president of the National Council of Justice, and concentrating the tasks of judicial management in the hands of the president of the new National Judicial Office, while leaving the responsibility for overseeing the uniform administration of justice with the president of the Supreme Court.

b. Legal issues

The applicant alleged that there has been a violation of Art. 6(1) and 10 ECHR.

In 2016 the Grand Chamber held that Hungary had violated Art. 6(1) and Art. 10 ECHR. The applicant claimed he had been denied access to a tribunal to challenge the premature termination of his mandate as President of the Supreme Court. He also contested that his mandate has been terminated as a result of him overstepping freedom of expression permissible to a judge and having expressed his views on judicial reforms in his capacity as the President of the Supreme Court.

c. Reasoning of the ECtHR

The Court found that in line with Art. 6 ECHR:

- the applicant's access to a court was not allowed in fact by the premature termination of his mandate as President of the Supreme Court, had been written into the Fundamental Law itself and was therefore not subject to any form of judicial review, including by the Constitutional Court. Unlike the former Vice-President of the Supreme Court, who was able to file a constitutional complaint with the Constitutional Court against the statutory provision which terminated his term of office, the termination of the applicant's mandate as President of the Supreme Court was provided for by the Fundamental Law;
- it was for the State to show that the subject matter of the dispute at issue is related to the exercise of State power or that it has called into question the special bond of trust and loyalty between the civil servant and the State that may justify the exclusion to the right to access to a tribunal. Since the State did not show such requirement, the Court held that there has been violation of art. 6 ECHR.

Under art. 10, the Court held that:

- the termination of the applicant's mandate undoubtedly had a 'chilling effect' in that it must have discouraged not only him but also the entire judiciary and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary;

-'the early termination of the applicant's mandate as President of the Supreme Court was a reaction against his criticism and publicly expressed views on judicial reforms, and not the result of the re-organisation of the judiciary in Hungary, as the Government have claimed, and thereby represented an interference with the exercise of his right to freedom of expression' (para 97).

To give evidence of this, the Court considered the following aspects:

- the proposals to terminate the applicant's mandate as President of the Supreme Court as well as the new eligibility criterion for the post of President of the Kúria were all submitted to Parliament after Mr Baka's public comments, and were adopted within an extremely short time;

- the separation of functions of the President of the National Council of Justice from those of the President of the new Kúria provided for by the new Fundamental Law did not imply that the functions for which the applicant had been elected ceased to exist on the entry into force of the Fundamental Law, as the Government have argued instead;

- it was not only Mr Baka's right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary, being his right to freedom of expression particularly relevant due to his office.

d. Outcome at national level

On 12 December 2011, EU Justice Commissioner wrote a letter to the Hungarian authorities raising concerns on the issue of the retirement age of judges besides concerns related to the President of the new National Judicial Office and the transformation of the Supreme Court into the Kúria, in particular the early termination of the applicant's mandate as President of the Supreme Court before the end of the regular term. The Hungarian authorities answered and the European Commission, on 11 January 2012, issued a statement on the situation of Hungary.

On 17 January 2012, the Commission started an 'accelerated' infringement proceedings against Hungary on, *inter alia,* the independence of the judiciary. The Commission stated that the new mandatory retirement age for magistrates violated the EU rules on equal treatment in employment (Directive 2000/78/EC) and discrimination at the workplace on grounds of age. The Commission also asked Hungary for more information regarding the new legislation on the organisation of the courts.

On 7 March 2012, the Commission delivered a reasoned opinion on the measures regarding the retirement age of judges and an administrative letter asking Hungary for further clarifications regarding the independence of the judiciary, in particular in relation to the powers attributed to the President of the National Judicial Office, including powers to designate a court in a given case and the transfer of judges without consent.

On 7 June 2012, the European Commission referred the case to the Court of Justice of the European Union (case C-286/12, *EC v Hungary*). On 6 November 2012, the Court of Justice delivered the judgement, declaring that by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries when they reach the age of sixty-two – giving rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary had failed to fulfil its obligations under Council Directive 2000/78/EC of 27 November 2000, which established a general framework for equal treatment in employment and occupation. The Court did not find the breach of the principle of legitimacy in introducing new age limits but it declared that the new law did not comply with the principle of proportionality and did not guarantee a simple replacement of generations within the legal professions in question.

After the delivery of the judgement by the Grand Chamber of the ECtHR, in September 2019 the Committee of Ministers of CoE examined the execution of the judgement and 'urged the authorities to provide information on the measures envisaged to counter this 'chilling effect' in order to fully guarantee and safeguard judges' independence and freedom of expression' by March 2021, including of the guarantees and safeguards protecting judges who publicly express their opinion about issues concerning the courts from undue interferences.

In September 2020, the European Commission Rule of Law's Report expressed serious concern on judicial independence since 'the National Judicial Council faces difficulties in counter-balancing the powers of the President of the National Office for the Judiciary; the election of the New President of the National Office for the Judiciary may open the way for reinforced cooperation. The NOJ President is elected by Parliament and is entrusted with extensive powers relating to the administration of the court system. The NOJ President operates under the supervision of the National Judicial Council. However, the National Judicial Council is facing a series of structural limitations that prevent it from exercising effective oversight regarding the actions of the NOJ's President. In particular, it has no right to be consulted on legislative proposals affecting the justice system. It has a limited role as regards judicial appointments, as

well as the appointment of court presidents and other court managers. Furthermore, the National Judicial Council has limited resources and depends on the NOJ President for budgetary disbursements. The absence of effective control over the NOJ President increases the possibility of arbitrary decisions in the management of the judicial system'.

The European Commission Rule of Law's Report released in September 2020 expressed serious concerns on the judicial independence, stating that 'the National Judicial Council faces difficulties in counter-balancing the powers of the President of the National Office for the Judiciary; the election of a new President of the National Office for the Judiciary may open the way for reinforced cooperation'.

e. *Additional relevant cases*

In its judgment of 8 April 2014 (Commission v Hungary, Case C-288/12), the Court of Justice examined the case of a former Hungarian data-protection supervisor whose mandate had been terminated upon the entry into force of the Fundamental Law, well before the end of his term. The case was brought before the Court by the European Commission in the context of a separate infringement procedure concerning Hungary's obligations under Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in relation to the requirement that the data-protection supervisory authority be independent.

The ECtHR elaborated its case-law on freedom of expression of magistrates in several cases.

In particular, in case in the case of *Harabin v Slovakia* (n. 62584/00, 29 June 2004) the Court held that, having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge calls for close scrutiny.

In the case *Wille v Liechtstein* (n. 28396/95, 28 October 1999), the Court stated that assessing whether an interference in the right to freedom of expression of a judge corresponds to a 'pressing social need' and 'was proportionate to the legitimate aim pursued' requires that the impugned statement of the judge is considered in the light of all the concrete circumstances of the case as a whole. In this context, a particular importance is attached to the office held by the

applicant, the content of the impugned statement, the context in which the statement was expressed and the nature and severity of the penalties imposed.

See also *European Court of Human Rights*, *Ramos Nunes de Carvalho e Sá v Portugal*, Applications Nos. 55391/13, 57728/13 and 74041/13, Judgment of 6 November 2018 **as** regards the lack of access to an effective remedy for a judge to challenge the disciplinary sanction of a fine equivalent to 20 days of salary for criticism addressed to a judicial inspector member of the Judicial Council.

Casesheet No. 6 – Defamation of judges and freedom of expression of lawyers

Reference case

European Court of Human Rights, *L.P. and Carvalho v Portugal*, Applications Nos. 24845/13 and 49103/15), Judgment of 8 October 2019, TRIIAL Database full summary[208]

Court of Justice of the EU, C-55/20, *Bar Association disciplinary court*, pending

Core issues -How far should judges be protected from criticism coming from lawyers acting under instructions from their clients?

At a glance

Country	Area	Reference to ECHR law	Legal and/or judicial body	Judicial InteractionTechnique	Remedy
• Portugal	• Accountability of lawyers • Freedom of Expression • Judicial Independence	• Article 6	• ECtHR	• Consistent interpretation	• Pecuniary damages covering the fees paid by the attorneys for the defamation offence and costs of litigation expenses

Timeline representation

[208] Casesheet based on template drafted by Rita Brito Hanek and Afonso Bras from CIDP

Case(s) description

a. Facts

The case concerned findings of liability against two lawyers for *defamation* (L.P.) and for attacking judges' honour, on account of documents drawn up by the lawyers in their capacity as representatives.

The applicants, L.P. and Pedro Miguel Carvalho, are two Portuguese lawyers who were born in 1965 and 1971 respectively. They live in Lisbon and Guimarães (Portugal). In 2008 L.P. sent a letter to the High Council of the Judiciary (HCJ) to complain about the conduct of Judge A.A. during a preliminary hearing and about certain procedural irregularities. In particular, he stated that he had noticed 'an atmosphere of great familiarity between the judge and defence counsel'. The HCJ decided to take no action on the complaint. Judge A.A. subsequently lodged a complaint for defamation against L.P., alleging an attack on her reputation and honour. In 2012 the Lisbon Court of Appeal ordered L.P. to pay 5,000 euros (EUR) to the judge, finding that the accusations made against her had overstepped the bounds of permissible criticism. L.P.'s appeals against that decision were unsuccessful.

In 2009 two persons of Roma origin, represented by Mr Carvalho, lodged complaints against Judge A.F. for defamation and racial discrimination on account of comments made by her in a judgment concerning them. After the case had been discontinued by the public prosecutor the same two persons, again represented by Mr Carvalho, brought a private prosecution for defamation, claiming EUR 10,000 from the judge. This complaint was declared manifestly unfounded by the Guimarães Court of Appeal. In 2011 the judge brought a civil action against Mr Carvalho, arguing that in his capacity as representative he had knowingly lodged an unfounded criminal complaint against her. Mr Carvalho was ordered to pay EUR 10,000 with default interest.

b. Legal issues

Two rights – the judge's right to the protection of his/her reputation and freedom of expression of lawyers are in conflict in this case. Having been convicted by Portuguese courts for defamation of two judges' reputations, the lawyers brought a case against Portugal for violation of the freedom of expression following the chilling effect of the high amount of penalties –

5000 Euros, respectively 10000 Euros. Are the penalties of an amount capable of having a chilling effect on the profession of lawyer as a whole, especially with regard to lawyers' defence of their clients' interests?

c. Reasoning of the ECtHR

The European Court of Human Rights noted that the decisions finding the applicants liable had constituted interference with the exercise of their freedom of expression. The interference had pursued two legitimate aims: (1) protecting the reputation and rights of others and protecting judges; and (2) maintaining the authority and impartiality of the judiciary.

Nevertheless, the European Court of Human Rights considered that the reasons given by the domestic courts to justify finding the applicants liable had been neither relevant nor sufficient and had not corresponded to a pressing social need. The interference had thus been disproportionate and had not been necessary in a democratic society. In its reasoning, the Court made the following observations.

Both applicants had been acting in the performance of their professional duties as lawyers. L.P.'s complaint to the HCJ had described the conduct of a preliminary hearing attended by him in his capacity as a representative and had drawn the HCJ's attention to situations he considered abnormal, with the aim of defending his client's interests. The criminal complaint and the private prosecution drawn up by Mr Carvalho had been aimed at prosecuting a judge for defamation and discrimination following allegations she had made against some of Mr Carvalho's clients in a judgment convicting them.

L.P.'s accusations had been criticisms of the kind that judges could expect to receive in the course of their duties, without their honour or reputation being damaged as a result. The accusations had not overstepped the bounds of permissible criticism; they had been sent to the HCJ alone and had not been made public. Hence, the alleged damage to the judge's reputation had been very limited. The case against Mr Carvalho concerned the fact that he had taken instructions from clients seeking to prosecute a judge for defamation and discrimination, following criminal proceedings which had received widespread media coverage owing to a judgment given by the judge in question against Mr Carvalho's clients. However, the prosecution had not been successful. The Court considered that Mr Carvalho had simply defended his client's interests and did not see how he had failed to observe professional ethics.

Furthermore, the Court took the view that seeking to compel a lawyer to refuse instructions was liable to infringe the right of each individual to have access to a court.

As to the severity of the penalties the Court found that, although the fine imposed on L.P. was small and his conviction did not give rise to a criminal record, the imposition of a criminal sanction in itself had a chilling effect on the exercise of freedom of expression. This was all the more unacceptable in the case of a lawyer who was required to ensure the effective defence of his clients. Furthermore, the applicants in both cases had been ordered to pay significant sums in damages to the judges concerned (EUR 5,000 in L.P.'s case and EUR 10,000 in the case of Mr Carvalho). Hence, the penalties imposed had not struck the requisite fair balance between the need to safeguard the judges' right to protection of their honour and the authority of the judiciary, on the one hand, and the applicants' freedom of expression on the other. They had also been apt to have a chilling effect on the profession of lawyer as a whole, especially with regard to lawyers' defence of their clients' interests.

The Court therefore held that there had been a violation of Article 10 of the Convention.

Analysis

a. Role of ECHR

In a European context in which judicial independence is becoming seriously undermined in some Member States, the judgment of the ECtHR informs us that judges can legitimately be subject to criticism, although to.a limited extent. In particular, those limitations on the freedom of expression cannot end up having a chilling effect on the practice of the professional activity of an attorney, if such an effect risks occurring then Member States must give preference to freedom of expression.

b. Impact of ECtHR decision

Despite numerous judgments of the European Court of Human Rights pointing to violations of freedom of expression and while basic standards for journalists are considered to be well established, insult and defamation is still punishable with imprisonment.

c. Additional relevant cases

One of the most important cases on the freedom of expression of lawyers is *Morice v France* delivered by the Grand Chamber of the ECtHR in 2015 (no. 29369/10, judgement 24 April 2015). In this case the applicant, a lawyer, was convicted of making defamatory comments about two judges that had been published in a national French newspaper. The First Section of the ECtHR did not find that the conviction of the lawyer violated his freedom of expression and referred the case to the GC. The Court held that the interference in the right of freedom of expression of magistrates was disproportionate. In particular, the Court held that the lawyer's remarks were part of a debate on a matter of public interest. The question here was the lawyer's freedom of expression outside the courtroom and not in defence of a client. However, the Court emphasised that lawyers should be able to highlight to the public any potential shortcomings in the justice system, and that while it was necessary to maintain the authority of the judiciary and protect them from certain criticism, this should not prevent individuals from expressing 'value judgements with a sufficient factual basis, on matters of public interest'.

The CJEU will soon have the opportunity to pronounce on disciplinary sanctions against lawyers for their exercise of freedom of expression in the pending case C-55/20. The Disciplinary Court of the Bar Association in Warsaw submitted a request for a preliminary ruling to the CJEU on 31 January 2020. In particular, the dispute originated by an appeal by Poland's Minister of Justice and Public Prosecutor General against a decision by the disciplinary court to discontinue disciplinary proceedings against a lawyer who was accused to have exceeded the limits of his right to free speech when he made comments regarding the relationship with his client.[209]

See also European Court of Human Rights, *Cimperšek v Slovenia,* on dismissal from the function of court expert for the exercise of freedom of expression in the form of criticism of the delays in the Ministry of Justice organisation of the oath ceremony. Following the *Čeferin v Slovenia* case, awareness is emerging that the protection of authority and reputation of the courts can limit the right of freedom of expression only when necessary in democratic society

[209] See L. Pech, Legal Opinion for the CCBE, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/EN_DEON_20201127_Laurent-Pech-Legal-Opinion-on-Case-C-5520.pdf.

and that participants in judicial proceedings enjoy a certain degree of freedom in their critical communication with courts or other institutions.

Casesheet No. 7 – Freedom of expression and judicial independence of prosecutors

Reference case

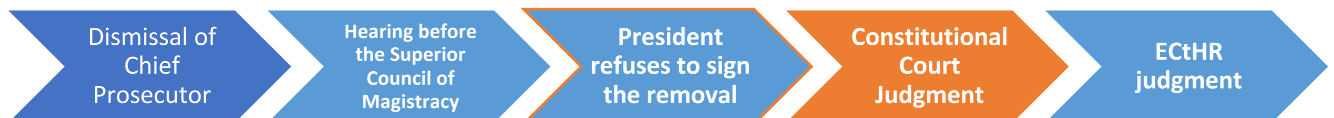
European Court of Human Rights, Kövesi v Romania, Applications Nos. 24845/13 and 49103/15), Judgment of 8 October 2019[210]

Core issues
Removal from office of Chief Prosecutor for, inter alia, part in public debates on legislative reforms affecting the judiciary and on issues regarding the independence of the judiciary.

At a glance

Country	Area	Reference to ECHR law	Legal and/or judicial body	Judicial InteractionTechnique	Remedy
• Romania	• Accountability of prosecutors • Freedom of Expression • Right to a fair trial	• Article 6 • Article 10	• Romanian Constitutional Court • European Court of Human Rights	• Consistent interpretation	• disapplication of national law

Timeline representation



Case(s) description

a. Facts

By the Presidential Decree no. 483/2013, the applicant was initially appointed for a three-year term as chief prosecutor of the National Anticorruption Directorate (Direcția Națională Anticorupție), hereinafter the 'DNA', from 15 May 2013 to 16 May 2016 and then reappointed

[210] Casesheet based on template drafted by Lawyer Dr. Anelis-Vanina Istratescu, Bucharest Bar Association, Romania. The full summary of the case can be found in the TRIIAL Database here: https://cjc.eui.eu/data/data?idPermanent=154&triial=1.

to the same position for a new three-year term, from 16 May 2016 to 16 May 2019, following the favourable opinion given by the section for prosecutors of the Higher Council of the Judiciary (Consiliul Superior al Magistraturii, hereinafter the 'CSM') to the proposal submitted by the Minister of Justice.

On 23 February 2018 the Minister of Justice sent the CSM a report on the managerial activity at the DNA, together with its proposal for the applicant's – Kövesi- removal from her position, submitting the reasons for the proposed removal:

- the lodging of three complaints with the Constitutional Court alleging breach of the Constitution by the DNA, settled under decision no. 68 of 27 February 2017, decision no. 611 of 3 October 2017 and decision no. 757 of 23 November 2017;
- the issuance by the DNA of press releases mentioning the fact the Government ordinance had been initiated without complying with the procedure for the drafting, endorsement and presentation of legislative proposals which, in the view of the Minister, represented an overstepping of the limits of the applicant's competencies.
- the applicant's personal involvement in the investigations conducted by the prosecutors operating under her supervision which, in the opinion of the Minister, proved lack of managerial skills.
- the existence of press releases mentioning pending disciplinary proceedings against the applicant for disciplinary offences.
- the existence of media statements made by the applicant allegedly contesting the general and binding character of the decisions delivered by the Constitutional Court of Romania and criticising the legislative changes which might have affected the fight against corruption, might have modified the jurisdiction of DNA, might have dismantled the DNA or might have eliminated the investigators' capacity to uncover and solve crimes.
- the increase of acquittals in the cases sent by the DNA to the courts.
- the lack of involvement in identifying and eliminating the abuses committed by prosecutors operating under the applicant's supervision.

The conclusion drawn from the report of the Minister of Justice was that the applicant had exercised and carried out her duties in a discretionary manner, turning the anti-corruption activities and the DNA away from their constitutional and legal role.

In the course of the hearing of 27 February 2018 held before the section for prosecutors of the CSM, the applicant stated that the Minister had never requested her point of view or clarifications from her with regard to the reasons invoked for her removal and responded to each allegation made by the Minister.

The Section for prosecutors of the Superior Council of Magistracy (SCM) refused by a majority to endorse her dismissal, largely rejecting the Minister's criticisms of the prosecutor and finding no evidence that her management had been inadequate. In April 2018 the President of Romania, Mr. Klaus Iohannis, refused in turn to sign the dismissal decree, which prompted a complaint to the Constitutional Court (CCR) by the Prime Minister. In May 2018, in a special procedure regarding legal conflicts of a constitutional nature between constitutional organs, by Decision No 358/2018, without summoning Mrs. Kövesi, who could not defend herself, the CCR ordered the President to sign the decree for the dismissal, finding, among other things, that neither the President nor the CCR were authorised to assess the reasons put forward by the Minister of Justice in his proposal. The CCR clarified that 'the administrative courts could only examine the external lawfulness of the administrative decision issued in the case, more specifically the lawfulness of the procedure but not its utility'.

Relying on Arts. 6, 10, and 13 ECHR, the applicant lodged an application with the ECtHR and complained about the violation of her right to have access to a court, of her freedom of expression and of her right to an effective remedy in the domestic legal system.

b. Legal issues

The case raises the issue of lack of access to a court and effective remedies, and thus of violation of Article 6 ECHR, for challenging the lawfulness of removal/dismissal of the Chief Prosecutor. As stated by the Romanian Constitutional Court, the review of her dismissal would be limited to the external formalities of adopting the decree, whereas the applicant's complaint had required an examination of the merits and the internal legality of the decree.

In addition, a violation of Article 10 was raised due to the removal from office being a disproportionate sanction for the Chief Prosecutor for expressing her opinion on legislative reforms which were likely to have an impact on the judiciary and its independence and, more specifically, on the fight against corruption conducted by her department.

c. Reasoning of the ECtHR

In its decision of 5 May 2020 delivered in the case of *Kovesi v Romania*, the ECtHR analysed whether Article 6 was applicable in the case, whether the application complied with the six-month time-limit challenged by the Romanian Government, whether the domestic remedies had been exhausted by the applicant and whether there would have been an effective remedy in the domestic legal system, reaching the following conclusions:

- The applicant had the right to serve a term of office until the end of her judicial mandate and must have had the standing to apply for a judicial review of her dismissal decision, which had a decisive effect on her personal and professional situation; in the Court's view, the applicant had the right not to be dismissed from her position as chief prosecutor of the DNA, outside the cases expressly stipulated by law;
- Article 6 of the Convention applied under its civil head in the applicant's case and the Government's objection of lack of jurisdiction *ratione materiae* was dismissed, on the ground that the conditions of the *Eskelinen test* had not been met in the case under examination, as the national law did not expressly exclude access to a court for the challenge of the unlawful termination of the applicant's mandate and that the removal decision had not been based on an objective justification in the State's interest.
- The Romanian Government's objection of non-compliance with the six-month time-limit was rejected, based on the finding that the starting point of the six-month time-limit was the date of the adoption and publication in the Official Gazette of the presidential decree removing the applicant from her position, namely 9 July 2018.
- The Romanian Government's objection of non-exhaustion of domestic remedies was joined to the merits of the case.

The Court found that there had been a violation of Article 6 of the Convention, based on the following grounds:

- A complaint to the administrative courts against the Report of the Minister of Justice would not have been an effective domestic remedy for the applicant, since the Constitutional Court itself considered the said document to be just a preliminary act leading to the adoption of the presidential removal decree and taking into consideration the fact that the same document had been challenged without success by non-governmental organisations.

- The applicant had no interest in challenging before the courts the decision of the CSM of 27 February 2018, as this decision was favourable to her.
- A complaint to the administrative courts against the presidential removal decree no. 526 of 2018 would not have been an effective domestic remedy for the applicant, as it would not have offered her an examination of the merits, of the internal legality of the mentioned decree and of the reasons of her removal from her position, but only a formal review which could not have led to the establishment of the appropriateness of the removal reasons, of the facts impugned or of the fulfilment of the legal conditions for its validity, especially the endorsement of the proposal of the Minister of Justice by the CSM.

The ECtHR dismissed the Romanian Government's objections of non-compliance with the six-month time-limit and of non-exhaustion of the domestic remedies, based on the same findings set out on the admissibility of the case in the light of Article 6, par. 1 of the Convention.

The Court found that there had been a violation of Article 10 of the Convention, ascertaining the following:

- The applicant's public statements on the legislative reforms proposed by the Government and the criminal investigations connected to these reforms had been considered as reasons for the applicant's dismissal, being mentioned in the report drawn up by the Minister of Justice;

- There was a causal link between the applicant's exercise of her freedom of expression and the premature termination of her mandate;

- It was not necessary to examine whether the interference with the applicant's freedom of expression had not been prescribed by the domestic law, namely article 54(4) and article 51(2) of Law no. 303/2004 on the status of judges and prosecutors, but whether the exercise of such freedom led to the removal from her post;

- The applicant's removal from her position did not serve the aim of protecting the rule of law or any other legitimate aim for the purposes of Article 10, par. 2 of the Convention, being the direct consequence of the exercise of her right to freedom of expression;

- The applicant expressed her views, in her professional capacity as chief prosecutor of the DNA, directly in the media or during professional gatherings, on the legislative reforms likely

to have an impact on the judiciary and its independence, on the fight against corruption and on the prosecutor's competence to investigate corruption offences, and informed the public about the investigations started for suspicion of corruption crimes committed by the members of the Government in connection with highly disputed legislative acts;

- The applicant expressed her views on matters of public interest requiring a high degree of protection for her freedom of expression and strict scrutiny of any interference of the State's authorities;

- The applicant's removal from her post could not have been reconciled with the principle of the independence of prosecutors, the key element for the maintenance of the judicial independence, and must have discouraged her and other prosecutors and judges from taking part in public debates on legislative reforms affecting the judiciary and on issues regarding the independence of the judiciary;

- The restrictions applied on the applicant's right to freedom of expression were not accompanied by effective and adequate guarantees against abuse, so that the applicant's removal from her position was not a measure necessary in a democratic society, in the meaning of Article 10, par. 2 of the Convention.

The ECtHR concluded that 'the premature termination of the applicant's mandate was a particularly severe sanction, which undoubtedly had a 'chilling effect' in that it must have discouraged not only her but also other prosecutors and judges in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary (para.209).

As for the remainder of the application, the ECtHR concluded that it was not necessary to examine the admissibility and merits of the complaint under Article 13 in conjunction with Article 6, par. 1 and Article 10 of the Convention separately.

d. Outcome at national level (follow-up judgment of the referring court)

For a summary of the various reactions of state actors, see the commentary of this case by Judge Dragos Calin.[211]

e. Additional relevant cases

On the role of the Romanian Constitutional Court, see: cases C-357/19, Euro Box Promotion and Others; C-547/19, Asociaţia 'Forumul Judecătorilor din România'; C-811/19, Ministerul Public; C-840/19, Ministerul Public; C-859/19, Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Direcţia Naţională Anticorupţie; C-926/19, Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Direcţia Naţională Anticorupţie and Others; C-929/19, CD. The cases are pending before the CJEU.

See also European Court of Human Rights, *Kayasu v Turkey*, Applications No. 64119/00 and 76292/01, Judgment of 13 November 2008.

[211] See Dragoș Călin 'The recent ECtHR Judgement Kovesi v Romania. Reactions of Romanian Authorities and Implications Regarding the Rule of Law' (*Strasbourg Observers,* 16 June 2020) <https://strasbourgobservers.com/2020/06/16/the-recent-ecthr-judgment-kovesi-v-romania-reactions-of-romanian-authorities-and-implications-regarding-the-rule-of-law/> accessed on 1 July 2022.

Casesheet No. 8 – Accountability of Judges, Portuguese Supreme Court

Reference case

Portuguese Supreme Court of Justice, Judgment of 26 October 2016

TRIIAL Database: https://cjc.eui.eu/data/data/data?idPermanent=467&triial=1

Core issues Accountability of judges, freedom of expression, trust. Defining the limits of engagement of a judge with parties outside of the context of proceedings in a given case.

At a glance

Country	Area	Reference to ECHR law	Legal and/or judicial body	Judicial InteractionTechnique	Remedy
• Spain	• (doubts concerning) impartiality of judges • freedom of expression of judges	• Article 10	• Portuguese Supreme Court	• NA	• NA

Case(s) description

a. *Facts & Summary of National Proceedings*

A judge, after a hearing and before the decision, made some comments to the defendants, leading them to believe that they would lose that action, without the judge having yet decided. This judge was subject to disciplinary proceedings. Dissatisfied, she appealed to the Supreme Court.

a. *Reasoning of the Court*

The Supreme Court has unequivocally condemned the behavior of the judge referring to deliberation of the Plenary of the HCJ of 11 March 2008, the HCJ bases the duty of reserve - which is currently enshrined in Article 7-B of the Statute of Judicial Magistrates (SJM) - on the 'protection of impartiality, independence, institutional dignity of the courts, as well as [on] citizens' confidence in justice', combining these grounds with the 'freedom of expression'

(paragraph II). From here, the HCJ concludes that this duty 'covers, in essence, the statements or comments (positive or negative), made by judges, which involve evaluative assessments about cases they are in charge of' (paragraph IV).

The judge in question made comments on a case he was in charge of, going against the SJM and the deliberation referred to. Moreover, the Supreme Court considers that such comments would only be admissible if, perhaps, they were part of a perspective of collaboration with the parties and their representatives, citing to this effect a 2006 Decision of the Italian High Council of the Judiciary – see, Sentenza de 24.11.2005/14.3.2006, n.º 146/2005, of the Consiglio Superiore della Magistratura.

Taking this case as a starting point and further analysing the deliberation, we note that it is also important insofar as paragraph VI of the deliberation states that the duty of reserve applies to 'pending cases and cases which, although already finally decided, deal with undeniably topical facts or situations'. In other words, judges have their freedom of expression limited both in relation to cases before them (as is the case of the current decision under analysis), and also in relation to those which, although already decided, are in the media.

Furthermore, what follows from paragraph V of the deliberation: 'all judges, even if they do not hold the cases, may be agents of the violation of the duty of reserve'. Thus, in other words, even if a judge is not responsible for a case, he may not comment on the case, whether or not it is in the media.

Whereas the Supreme Court does not make use of the case law of the Strasbourg Court, it explicitly makes the reference to Art. 10(2) ECHR when assessing the permissible limits of the freedom of expression of judges. Here the legitimate objective justifying such limitation is the duty of reserve binding on all judges.

The duty of reserve prevents a judge from issuing valuation judgments on any lawsuits and, in particular, on those in charge, by requiring him to refrain from making comments or considerations that can reasonably be interpreted as prejudices in relation to the matter to be decided, thereby preventing the decision recipients and the general public from creating mistrust about their decision and affecting the community's confidence in the administration of justice. The Supreme Court emphasized that it is not of relevance whether the conversation

took place in the presence of applicants and/or other audience and whether it took place in the courtroom or not.

b. Comments and the Context

It is important to note that these specific points of the deliberation did not meet with a consensus within the HCJ, with some members voting against, citing an excessive limitation on the freedom of expression of judges. This was the case of Alexandra Leitão and Edgar Lopes, who considered that this solution causes judges to be pushed into a 'situation of impediment to participation in public debate on matters of the area of justice' and that the opposite solution would contribute towards keeping 'wrong ideas (and even harmful to the image of Justice) of the existence of corporate solidarity' away from public opinion.

Even so, and as stated above, it was the opposite understanding that prevailed, which was materialised in the deliberation in question. This has been the understanding of the Supreme Court. And the High Council of the Public Prosecutor's Office has a similar understanding for the respective magistrates - see, thus, the Deliberation of the High Council of the Public Prosecutor's Office, of 15 October 2013, and article 102 of the Statute of the Public Prosecutor's Service, approved by Law no. 68/2019, of 27 August.

The judgement echoed subsequently in a number of cases. For instance, in reference to Judge Clara Sottomayor, of the Supreme Court of Justice, and the comments she made on her Facebook page regarding the murder of a nine-year-old child by her father. When it was made public that the father had killed the child, in June 2020, Clara Sottomayor - who had no connection to the process regarding the custody of the child - made a post on Facebook stating: 'How many times has this girl told the court that she didn't want to go to her father's house? Was there a process of parental responsibilities with shared custody? Was the child heard? This has to be investigated to the end. It is necessary to know why the court ordered shared custody'. At the time, these comments generated a wave of criticism from judges and lawyers, who felt that the judge violated her duty of reserve. In turn, Clara Sottomayor understood that she had not violated any rule and that she was only exercising her right to civic participation as a citizen. The truth is that the HCJ, in a deliberation of 8 September 2020, although it did not open disciplinary proceedings, decided to apply to the judge a sanction of an unrecorded warning. – see, Press Release of the HCJ, 8th September 2020: https://www.csm.org.pt/2020/09/09/nota-de-imprensa-conselheira-clara-sottomayor/

Also with regard to this duty, it should be noted that Article 7-B(2) of the SJM, in line with the Deliberation of the Plenary of the HCJ of 19 January 2011, states that judges may only make public statements or comments on any judicial proceedings when this becomes necessary for the defence of honour or other legitimate interest and if authorised by the HCJ. This is an attempt to reconcile the duty of reserve with freedom of expression, particularly in those situations where, from the outset, freedom of expression, when weighed against the duty of reserve, should prevail.

This is, therefore, the rationale behind possible conflicts between freedom of expression and the duty of reserve in relation to judges:

- On the grounds of protecting the impartiality, independence and institutional dignity of the courts, all judges should refrain from making comments, either on the cases in hand or on other cases for which they are not responsible, especially the 'media' ones;
- If any judge feels that his or her honour has been harmed, then they may exercise their freedom of expression, but only after authorisation from the HCJ;
- If this set of obligations is disrespected by judges, the HCJ may impose sanctions on them, which may range from a simple warning to the suspension of the referred judge.

If we look at the decision under analysis, we see that it supports precisely this understanding. In fact, if it is true that it even refers to Article 10 ECHR, it is also true that, together with that reference, and in order to justify the framework just explained, it makes use of paragraph 2 of that same article, which provides limits and restrictions to freedom of expression, reaching the conclusion that the duty of reserve is part of those restrictions.

In fact, this understanding is not unusual, to the extent that, as we have been showing, it fits an understanding that is supported both in the HCJ and in the courts, namely in the Supreme Court of Justice. To better understand this, see the following two decisions:

- Ruling of the Permanent Council of the Supreme Judicial Council of the Magistrature of 9 November 2004. In this case, in summary form, a judge had given an interview to a well-known generalist television channel, in which she stated that there were 'lobbies' ' in the HCJ who, in her understanding, vitiated the distribution of cases and compromised the image of Portuguese justice. In the decision, it highlighted the importance of the right to freedom of expression, referring that it is expressly

consecrated in the ECHR, in the Declaration of Human Rights and in the International Covenant on Civil and Political Rights. Later, however, it concludes that there are no absolute rights and, citing jurisprudence of the Spanish Constitutional Court - v.g., Sentence No. 270/1994, of 17 October 1994 - and of the ECHR - Case of *Haes and Gisjsels* v Belgium, of 24.02.1999 -, states that 'there are sectors or groups of citizens subject to stricter or specific limits as regards the exercise of the right to freedom of expression, on the basis of the function they perform, a line of thought also adopted by the ECHR, in its interpretation of Article 10 ECHR'. It concludes, therefore, that although the judge was 'fully within her rights to give opinions, express her positions and exercise her right to criticism', and although the statements did not refer to any type of case underway, whether under her responsibility or not, she should not have forgotten that she was still subject to the constraints 'arising from her position as a judge and her particular knowledge, having exceeded the limits of what is permissible (in view of her status and her special responsibilities to the community)'. It was not by chance, therefore, that the decision in question ultimately determined the application of a disciplinary penalty to the judge;

- Ruling of the Supreme Court of Justice of 27 October 2009, Case No. 21/09.8YFLSB. Again, this is a case of a judge who gave an interview and made statements on justice and corruption. Here, the STJ adopted the understanding that we have been explaining: although referring to Article 10 ECHR, it referred, at the same time, that the duty of reserve is included in the restrictions allowed by paragraph 2 of that article, concluding that the judge should have 'paid attention to the intensity that her words could bring in terms of the credibility of public opinion, thus violating the duty of reserve and of correction'.

These examples are important because, invoking the judge's freedom of expression and the duty of reserve contained in the SJM (which, at the time, had a wording that was very similar to the current one), they reach the conclusion that, even when the assumptions for the application of that duty are not fulfilled, the judge's freedom of expression is still limited in view of his or her 'status' and 'special responsibilities' - in reality, and as the first decision argues, 'one cannot speak on television (. ... the same that one speaks or says at home with and to friends, or at a coffee table with colleagues: the demands are different, the audience is different, the degree of danger is incomparable. What can be seen as a simple and inconsistent venting (...), in the other becomes news and is treated as such'.

We therefore conclude that Portugal is characterised by still having a limiting framework for the freedom of expression of judges, imitations that may act on two levels:

(i) Firstly, invoking the duty of reserve if it is understood that the respective assumptions are fulfilled;

(ii) Secondly, and in the event that the first situation cannot be effected, invoking the special responsibilities of the judge in the protection of impartiality, independence, the institutional dignity of the courts and also the confidence of citizens in justice.

Case Study 4 – Actors in defence of rule of law - assessing the guarantees of judicial independence and impartiality in one's own legal system (Karolina Podstawa, University of Maastricht)

1. Trends in case law

This section presents the selected case law of national and supranational courts which brings to the attention the guarantees of fair trial inasmuch as organisation of administration of justice process is concerned in a given jurisdiction. Whereas in the past the case law was highly incidental, putting into question a standard in question only when applicable to an individual, the case law that proliferated after the beginning of the administration of justice reform processes in Poland, Hungary and Romania allows for a better representation and the understanding of not only the standard of judicial independence, impartiality and accountability, but also procedural paths that, for better or worse, allow stakeholders to both ensure judicial oversight of the situation as well as the insurance of the improvement of sage trial warranties in a given context.

There are four constellations listed in no apparent order with the uniform criterion of who is the source of the claim and proceedings.

Constellation No 1. Judges vis-à-vis rules concerning administration of justice

Discrimination on Grounds of Sex - Spanish Supreme Court, 2039/2016, 10 May 2016

TRIIAL Database:

In the case decided by the Spanish Supreme Court the matter of accountability of the General Council of the Judiciary regarding judicial appointments, the main legal issue refers to the review by the Supreme Court of the decisions of the General Council of the Judiciary regarding judicial appointments to the presidency of high courts and the effectiveness of that review in the light of the principle of non-discrimination. The challenging party was Ms Alonso Saura, ranked in the second position. As the result of the review, Ms Saura was successful in securing her appointment due to the fact that her qualifications were clearly superior to the original appointee. The decision was re-assessed by the General Council with the result of Mr. Pasqual de Riquelme being ultimately appointed to the position on the High Court of Justice with the elaborate explanation why he made a better candidate. This was apparently the fulfilment of conditions set up by the Supreme Court. Ms Alonso Saura challenged this decision before the Constitutional Court. The latter declared the complaint inadmissible but used the opportunity to explain why the violation had not occurred.

Polish Judges vis-à-vis reforms targeting rule of law - Joined Cases C-487/19 and C-508/19 W. Ż. () and des affaires publiques de la Cour suprême – nomination), ECLI:EU:C:2021:798

Judge W.Ż. (Władysław Żurek) was a member National Council for the Judiciary, Poland 'the KRS') and after publicly criticizing the judicial reforms in Poland he was demoted to a court of first instance. He appealed the decision before the KRS which discontinued the appeal, and thus W. Ż turned to the Polish Supreme Court. After lodging that appeal, W.Ż. submitted a petition for all judges of the Supreme Court sitting in the Chamber of Extraordinary Control and Public Affairs ('CECPA') to be barred from his hearing, as, given its 'systemic framework and the manner in which its members were elected by the KRS, which had been established contrary to the Constitution, the CECPA could not examine the appeal impartially and independently in any composition that included its members'.[212]

[212] Case C-487/19 *W. Ż.,* para 5.

In Case C-508/19 M. F., a district court Judge Monika Frąckowiak was accussed of conducting over lengthy proceedings and of not drawing written grounds for her judgements in the timely manner. In this case the CJEU was asked to determine whether the Court composed of judges whose appointment was ineffective would be in line with the standard of judicial independence, impartiality and accountability. The question was the more pertinent, given that the Disciplinary Chamber would determine the existence of the professional relationship.

The reasoning of the court starts with confirming that in the cases at stake the protection for judges comes under the scope of the protection afforded in the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter; right 'to effective judicial protection which implies that his action must be examined by a body which has the status of a 'court or tribunal' as defined by EU law, that is, a body which is independent, impartial and established by law. [Margarit Panicello (C-503/15, EU:C:2017:126]. In this case, as the KRS is not a court or a tribunal, the only judicial body which could respect the above requirements is the Supreme Court as the only and final judicial instance called on to verify whether the interference in judge's professional status did not undermine the guarantees which he has under those same provisions, read in conjunction with Article 6 of the ECHR, which requires the resolution of the question whether the judge concerned (A.S.) satisfied those requirements. [213]

The salient point here is whether the fact that there was an ongoing judicial review of KRS resolutions (adopted in the course of the Supreme Court appointment procedure) has (or should have) suspensory effect (as argued in AG Tanchev's Opinion in *A.B. and Others* and as the Court has confirmed in its judgment in that case in the meantime [*A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Courr EU:C:2019:982*] an appeal such as that brought before the Supreme Administrative Court on the basis of Article 44(1a) to (4) of the Law on the KRS is devoid of any real effectiveness and offers only the appearance of a judicial remedy.[214]

In line with paras 55 and 56 of the judgement successive amendments to the Law on the KRS which have the effect of removing effective judicial review of that council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court are liable to infringe EU law. Of course 'it will be for the referring court to make its own

[213] Para. 49.
[214] Para. 50.

assessment, – it is my opinion that the retrograde impact of the national provisions concerned on the effectiveness of the judicial remedy available against the resolutions of the KRS proposing the appointment of judges to the Supreme Court infringes the second subparagraph of Article 19(1) TEU'

In addition, in line with the guidance provided by *AB* case, in the Polish context the second subparagraph of Article 19(1) TEU requires that the decisions adopted in the course of the appointment procedure for judges in the Supreme Court be subject to judicial review with suspensory effect.[215]

In the light of the proved twofold breach of Article 179 of the Constitution. First, the President of the Republic appointed A.S. in circumstances in which the legal status of KRS Resolution No 331/2018, which included the motion for his appointment, was not permanent Moreover, in the referring court's view, there has also been a breach of the principle of the separation and balancing of powers and of the principle of legality. As the result, such resolutions provided no grounds for a motion that the President of the Republic appoint the persons concerned to vacant judicial positions. As the resolutions were subject to appeal, the vacant judicial positions were not filled in accordance with the law.[216]

As a consequence, the act of appointment as judge of the Supreme Court adopted by the President of the Republic before the Supreme Administrative Court ruled definitively on the action brought against Resolution No 331/2018 of the KRS constitutes a flagrant breach of national rules governing the procedure for the appointment of judges to the Supreme Court, when those rules are interpreted in conformity with applicable EU law (in particular, the second subparagraph of Article 19(1) TEU)

The right to a tribunal established by law, affirmed by the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter must be interpreted in the sense that a court such as the court composed of a single person of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court (Poland) does not meet the requirements to constitute such a tribunal established by law in a situation where the judge concerned was appointed to that position in flagrant breach of the laws of the Member State applicable to judicial appointments to the Supreme Court, which is a matter for the referring court to establish. The referring court

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[215] Para. 57-58.
[216] Para 59.

must, in that respect, assess the manifest and deliberate character of that breach as well as the gravity of the breach and must take into account the fact that the above appointment was made: (i) despite a prior appeal to the competent national court against the resolution of the National Council of the Judiciary, which included a motion for the appointment of that person to the position of judge and which was still pending at the relevant time; and/or (ii) despite the fact that the implementation of that resolution had been stayed in accordance with national law and those proceedings before the competent national court had not been concluded before the delivery of the appointment letter.

Constellation No. 2 Pragmatic individuals and lawyers challenging standard of judicial independence

Xero Flor w Polsce sp. z o.o. v Poland (ECtHR, Application No. 4907/18); 07.05.2021

It is the first time the ECtHR has elaborated on the status of a judge of a constitutional court, finding that such a person was appointed unlawfully and as a result, their participation in ruling in a case caused a violation of Article 6(1) of ECtHR to occur – the right to a fair trial before an independent tribunal established by law. It is the first major ruling of the ECtHR in a case directly related to the backsliding of the rule of law in Poland, as the established violation of the right to fair trial resulted directly from the political takeover of the Polish Constitutional Tribunal.

The case concerned a Polish entrepreneur who sought compensation from the Polish state due to a wild game – the aforementioned boars and deer – destroying a field of rolled grass owned by his company. In doing so, the applicant was awarded a minuscule compensation because an act of secondary law set rates for damage to fields of turf at a much lower level than rates for fields of wheat or corn. After losing his case at all other Polish court-levels, the applicant turned to the Constitutional Tribunal, asking it to review the conformity of laws that put him at a disadvantage with the Polish Constitution. But the Tribunal dismissed his case with the panel making the decision including the judge M.M. – quite manifestly Mr Mariusz Muszyński, the vice-president of the Tribunal, whose election was rife with controversy as the Polish parliament elected three judges of the Tribunal through 'overwriting' earlier appointments made by a previous parliament.

Aside from paying out the monetary compensation, the Polish authorities should also implement the Xero Flor judgment to ensure that the situation will not repeat itself.

Xero Flor judgement can be compared with the earlier judgement scrutinising the position of the Polish court manned by junior judges (assessor sądowy) as assessed by ECtHR in 2010 judgement *Henryk Urban and Ryszard Urban v Poland*[217]. The case concerned the applicants' conviction of 2 October 2007 by the Lesko District Court for refusing to disclose their identity to the police. They appealed, objecting to the fact that their case had been decided by an 'assessor' ('asesor sądowy', a junior judge), and not by a judge. Assessors are candidates for

[217] *Henryk Urban and Ryszard Urban v Poland* App No 23614/08 (ECtHR, 30 November 2010).

the office of district court judge who, under the Law of 27 July 2001 (the '2001 Act') on the Organisation of Courts, have to work for a minimum of three years as an assessor in a district court on completion of their training and examinations. At the time, assessors were allowed to exercise certain elements of judges' work which in itself was considered to be contrary to the Constitution by the Polish Constitutional Court.

In its judgment, however, the Constitutional Court had not excluded the possibility that assessors or similar officers could exercise judicial powers provided they had the requisite guarantees of independence. Referring to international standards, it had pointed to the variety of possible solutions for allowing adjudication by persons other than judges. Indeed, the Court noted that its task in this case was not to rule on the compatibility with the Convention of the institution of assessors or other similar officers which exist in certain Member States of the Council of Europe, but to examine the manner in which Poland regulated the status of assessors.

Like the Constitutional Court, the ECtHR considered that the assessor in the applicants' case had lacked independence, as she could have been removed by the Minister of Justice at any time during her term of office and that there had been no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister. Nor had that failing been rectified on appealed by the Regional Court. Although composed of a professional judge with tenure and thus 'an independent tribunal' as required under Article 6(1) ECHR, the Regional Court had not had the power to quash the judgment against the applicants since the assessors, in accordance with the 2001 Act, had been authorised to hear cases in first instance courts. In any event, the issue of the lack of independence of the assessor had been raised by the applicants in their appeal, which the Regional Court had dismissed as unfounded. Moreover, any appeal based on the unconstitutional status of assessors had been bound to fail as the provisions at issue of the 2001 Act had remained legally binding for a period of 18 months following the Constitutional Court's delivery of its leading judgment. The Court therefore held that the Lesko District Court had not been independent, in violation of Article 6(1) ECHR.

Xero Flor judgement was followed by the Application in case **Advance Pharma Sp. z o. o. v Poland (Application No 1469/20),** this time concerning a complaint brought by a pharmaceutical company that the Civil Chamber of the Polish Supreme Court, which decided on a case concerning it, was constituted in breach of the law following changes to the judiciary introduced in 2017. It is one of circa 94 complaints concerning the Polish situation between

2018 and 2022. This application (as many others) concerns the status of the Polish Supreme Court.

The applicant submitted, in particular, that the Civil Chamber did not constitute an 'independent and impartial tribunal established by law' because it was composed of judges recommended by the National Council of the Judiciary ('the NCJ'), the constitutional organ in Poland which safeguards the independence of courts and judges, which has been the subject of controversy since the entry into force of new legislation providing that its judicial members are no longer elected by judges but by the Sejm (the lower house of Parliament). The Court gave notice of the application to the Polish Government and put questions to the parties under Article 6(1) (right to a fair trial) of the Convention.

The ECtHR decided that the Civil Chamber of the Supreme Court, which consists of the judges appointed following the reforms of the National Council of the Judiciary cannot be considered an 'independent and impartial tribunal established by law'. The Court emphasized that its task was predominantly to assess whether the reforms of the Polish judicial system have affected negatively the applicant's company's rights under Art. 6(1) ECHR. The ECtHR found that the procedure was affected unduly by the legislative and executive. This conclusion echoed other judgements on the Polish Supreme Court assessing the position of its other chambers in *Reczkowicz v Poland*[218] and *Dolińska-Ficek and Ozimek v Poland*[219].

Importantly, The Court applied the criteria laid down by the Grand Chamber of the Court in the case of *Guðmundur Andri Ástráðsson v Iceland*[220] (no. 26374/18) of December 2020 and applied the above-mentioned case law. And so, in the first place the manifest breach of domestic law was established given that the NCJ did not provide sufficient guarantees of independence from the legislative or executive powers and due to the fact that the appointment by the President took place regardless of the pending judicial review of the appointment by the Supreme Administrative Court. In addition, the ECtHR pointed to the fact that the Civil Chamber of the Polish Supreme Court does not constitute a 'tribunal established by law', a conclusion reached in the judgements of this very court, also in the light of the CJEU's view.

[218] *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021).
[219] *Dolińska-Ficek and Ozimek v Poland* App nos 49868/19 and 57511/19 (ECtHR, 8 November 2021).
[220] *Guðmundur Andri Ástráðsson v Iceland* (n 39).

Filippini v San Marino, Application No 10526/02; 26.08.2003

The applicant, who was prosecuted for defamation, was sentenced to a fine. He claimed that the fact that the San Marino judges were appointed by Parliament meant that his case could not be examined by an independent and impartial tribunal.

The ECtHR asserted that the mere appointment of judges by Parliament cannot be seen to cast doubt on their independence and is not enough to declare the lack of independence of the judges, which requires a further step,

> *'A cet égard, leur seule élection par le Parlement ne saurait entacher l'indépendance des juges s'il ressort clairement de leur statut que, une fois désignés, ils ne reçoivent ni pressions ni instructions de la part du Parlement et exercent leurs fonctions en toute indépendance.'*

The Court declared the applicant's complaint inadmissible as being manifestly ill-founded, finding that political sympathies, which may play a part in the process of appointing judges, could not in themselves give rise to legitimate doubts as to their independence and their impartiality. The Court noted in particular that the fact that the judges were elected by Parliament did not affect their independence if it was clear from their status that, once appointed, they were not subject to any pressure and received no instructions from the Parliament and that they acted in complete independence.

The San Marino law in question defined the status of the judges in that sense and the sole fact that the judges were appointed by Parliament did not justify the conclusion that Parliament issued instructions to the judges in the context of their judicial powers. In the present case, there was no objective reason to suspect that the judges dealing with the matter had not acted consistently with their legal status. Lastly, the applicant had not alleged that the judges concerned had acted under instructions or showed bias.

Case Study 5 – Searching for analogies –case of arbitration and alternative dispute resolution[221]

1. Introductory Comments

In the reasoning presented for the purposes of TRIIAL project arbitration is understood broadly in all its facets including sports or investment arbitration. Over the years, in part because of its historical detachment from the some of the arrangements concerning enforcement of the judgements,[222] and in part as the result of convenience behind practice of arbitration, its alternative character positioned it more in opposition to the usual system of administration of justice, than as procedure complementing it. And yet in the past years the rapid increase in the modalities of arbitration and introduction of the whole array of Online Dispute Resolution (ODR) and Alternative Dispute Resolution (ADR) frameworks in the variety of sectors of EU law, arbitration is widely used in investment and trade agreements and on commercial level. In addition, arbitrators can and do adjudicate on matters related to EU law.

All these developments point to the need to include in the Europe-wide discussion on the rule of law and independence on adjudicators also arbitrators. Their specific contribution can be recognised in three areas specifically: right to a fair trial in arbitration (which impacts right to a fair trial in broader terms, should an award be analysed by a court due to procedural mistakes), a notion of independence and impartiality, in particular from the parties to the case, and accountability of both arbitrators and arbitral institutions.

2. Trends in Case Law

Judicial contributions to arbitral awards, and, by extension, to arbitral systems, are relatively infrequent. In addition, especially commercial arbitration awards are by default confidential, and thus it is difficult to evaluate the cross-fertilization of fields. The opinion that arbitral institutions are to be considered analogously to bodies whose decisions are subject to review by European courts and thus subject to similar rules as courts seems to be increasingly accepted. However, the system of guarantees to be put in place, remains a subject of debate due to its

[221] Authored by Karolina Podstawa (University of Maastricht) and Barbara Warwas (The Hague University of Applied Sciences).
[222] Arbitration until ca 20 years ago has been excluded, for instance from 1968 Brussels Convention on jurisdiction and enforcement in civil and commercial matters. 2001 Brussels Regulation categorically forbade arbitral tribunals to seek preliminary rulings from CJEU.

open-ended character. From this perspective, it is mostly the ECtHR that adds to the understanding of the right to a fair trial that must be guaranteed in arbitral proceedings.

As recently as on 1 March 2016, ECtHR recognised a right to a fair trial in arbitration in *Tabbane v Switzerland.* The Court emphasized that subjecting oneself to arbitration is indeed a voluntary act, however, it is obligatory for institutions offering arbitration to ensure that guarantees set forth in Art. 6(1) ECHR are met. Waivers of certain rights are acceptable as long as they are lawful, voluntary and equivocal. The ECtHR subsequent contribution in *Mutu and Pechstein v Switzerland* shed more light on the content of the guarantees and acceptable waivers. In both cases the national court (in the two cases Swiss Federal Tribunal) did not voluntary engage in examination in detail of the claims of applicants concerning the position of arbitrators and arbitral institutions.

From this perspective it is important to emphasize that arbitration to a large extent does amount to the waiver of the right of access to court[223], modifies it by allowing the dispute to be settled by a special tribunal set up to determine a limited number of special issues,[224] or allows for the exclusion of the right to a public hearing.[225] The ECtHR recognises the difference between the obligatory and voluntary arbitration, requiring a higher threshold for the guarantees under Art. 6(1) ECHR to be met in the former one.[226]

The waiver of access to court constitutes a limitation of the right to access to court[227] and, as such, must meet the conditions of being in pursuit of a legitimate aim, lawful and proportionate.[228] Assessment whether these conditions may take into consideration, for instance, whether parties were included in the constitution of the arbitral tribunal, [229] from the perspective of the equality between the parties in a given case (examining the condition of a free consent to arbitral proceedings),[230] or taking into the account the behaviour of parties

[223] *Suovaniemi v Finland* App no. 31737/96 (ECtHR, 1999).
[224] *Mutu and Pechstein v Switzerland* App nos 40575/10 and 67474/10 (ECtHR, 2 October 2018), para 94.
[225] See, the detailed analysis in *Transado Transportes Fluviais Do Sado SA v. Portugal* App no 35943/02 (ECtHR, 16 December 2003).
[226] See for instance: *Tabbane v Switzerland* App no 41069/12 (ECtHR, 1 March 2016) and *Mutu and Pechstein v Switzerland* (n 223), paras 95-96.
[227] idem, para 93.
[228] Arguably, it can fulfil conditions of being free, lawful and unequivocal as per *Nordström-Janzon and Nordström-Lehtinen v the Netherlands* App no. 28101/95 (Commission, 27 November 1996) where the Commission's wording refers only to absence of 'constraint' and 'duress' for an arbitration agreement to amount to a renunciation of rights established by art. 6(1) ECHR.
[229] Compare, for instance: *Lithgow and Others v the United Kingdom* App no 1643/06, (ECtHR, 8 July 1986); *Suda v the Czech Republic* App no 1643/06 (ECtHR, 28 October 2010).
[230] *Mutu and Pechstein v Switzerland* (n 223), paras. 109-115 and 116-123 assessing the position of two applicants.

during the dispute (thus examining the condition of unequivocality) who may have not sought the alteration of panel's composition.[231]

The renunciation of the right to a public hearing also does not seem to form issues from the ECtHR's perspective given the far-reaching possibility to limit this right also by courts belonging to state's system of administration of justice.[232]

At the same time, examples from national analysis of arbitral awards point to how difficult it is to put these safeguards in place and to examine them given the particular confidential character of proceedings. Perhaps, therefore, it is time to consider the new standard of arbitral independence, such that would guarantee to a sufficient degree the right to a fair trial of parties of arbitral proceedings whilst taking the quasi-judicial function thereof sufficiently into account.

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[231] *Ibid* and as discussed by ECtHR in Suovaniemi v Finland (dec.) no. 31737/96, 23 February 1999.
[232] *Mutu and Pechstein v Switzerland* (n 223), paras 175-185. See also how this line of reasoning is accommodated by national court, as in Zurich Federal Tribunal' case No. 4A_486/2019.

Casesheet No 9 – Application of Art. 6(1) ECHR to the Arbitration Context – EctHR, *Mutu and Pechstein v Switzerland*

Reference case

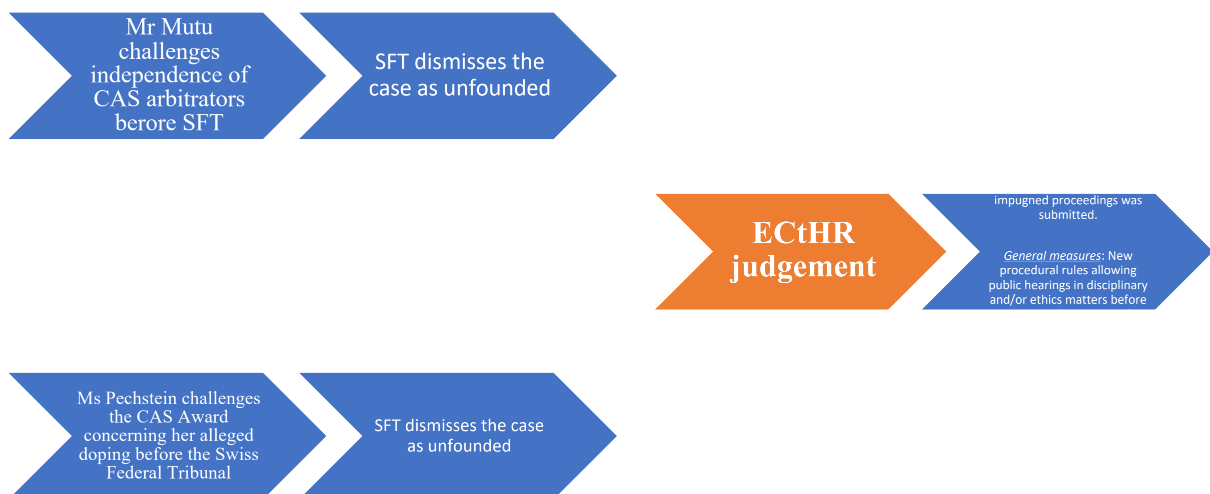
European Court of Human Rights, Mutu and Pechstein v Switzerland, Applications no. 40575/10 and no. 67474/10, Judgment of 2 October 2018

Core issues
Challenges to the independence and impartiality of arbitrators and the Court of Arbitration for Sport

At a glance

Country	Area	Reference to ECHR law	Legal and/or judicial body	Judicial InteractionTechnique	Remedy
• Switzerlad	• - position of artbitrators of Court of Abitration of Sport • The approach of Swiss Federal Tribunal • independence from the parties	• Article 6 • Right to a fair arbitration	• European Court of Human Rights (Grand Chamber)	• Consistent interpretation	• Non pecuniary damages • Alteration of rules at CAS

Timeline representation



Case(s) description

a. Facts & Summary of National Proceedings

Claudia Pechstein is a German speedskater who – since 1992 – has won 60 medals at international competitions including at the Winter Olympics. After receiving a two-year doping ban in 2009, Claudia Pechstein appealed the original International Skating Union (ISU) decision to CAS, before challenging the adverse CAS award in the Swiss Federal Tribunal (SFT). After failing there, Claudia Pechstein turned to the Munich Court of Appeal and the German Federal Court. The German Federal Court of Justice, on 7 June 2016, stated that while it was true that the ISU had a monopoly within the meaning of German competition law, athletes, nevertheless, freely agreed to the arbitration clause providing for the jurisdiction of the CAS and that practice did not therefore constitute an abuse of a dominant position.

In November 2010, Claudia Pechstein applied to the ECtHR and alleged an infringement of her human rights under Article 6(1) ECHR. She argued that, due to the 'forced' nature of the arbitration clause in the ISU Anti-Doping Regulations, she had not properly waived her rights; thus, Article 6(1) ECHR should apply to CAS in full.

She then claimed two violations of those rights: 1) her 'civil rights' were not allegedly determined by an 'independent and impartial tribunal'; and 2) a 'public hearing' did not take place, despite the fact that she requested one. In this respect, she alleged that the president of the arbitral panel in her case was not impartial (due to his previous refusal to be appointed as an arbitrator by athletes accused of doping), and that CAS's structure was inherently not independent/impartial due to the influence exerted over it by international sports federations. Claudia Pechstein also made an application for damages to be awarded under Article 41 ECHR for the losses she had suffered in unsuccessfully challenging the CAS decision before the German courts. She claimed €3,554,124.09 in pecuniary damages, and €400,000 in non-pecuniary damages.

Adrian Mutu is a former Romanian professional footballer who signed for Chelsea in 2003. A year later, he tested positive for cocaine and was consequently released by the club. Chelsea sought compensation and, after the case proceeded to FIFA's Dispute Resolution Chamber, the player was ordered to pay over €17 million in damages.

Mutu's appeal to CAS against this award was unsuccessful. However, he appealed that decision to the SFT, arguing that CAS had failed to provide him with the necessary guarantees of independence and impartiality under the relevant arbitration laws. This challenge also failed.

In July 2010, Adrian Mutu and Ms Pechstein applied to the ECtHR arguing that he had not received a hearing from an 'independent and impartial' tribunal. Though his case was joined with Pechstein's, Mutu's case differs from Pechstein's in two keyways:

- Rather than attacking the structure of CAS as a whole, Adrian Mutu simply alleged that two arbitrators in his specific case lacked independence;

- Unlike the clause in the ISU's Regulations, the FIFA Regulations at the time did not contain a 'forced arbitration' clause; Article 42 of the 2001 Regulation merely gave the possibility of acceding to the ordinary jurisdiction.

b. Legal issues

The ECtHR examined the three legal issues:

1. Whether the applicants voluntary accepted the arbitration clauses that gave raise to arbitration proceedings and whether their consent to arbitration is valid.
2. Whether the applicants, in accepting CAS's jurisdiction, the applicants had voluntarily waived their rights under Article 6(1) ECHR.
3. Whether CAS can be considered an independent and impartial tribunal established by law.
4. Whether the right to a public hearing was violated by CAS.

c. Reasoning of the ECtHR

On arbitration and the right to court

'94. This access to a court is not necessarily to be understood as access to a court of law of the classic kind, integrated within the standard judicial machinery of the country; thus, the 'tribunal' may be a body set up to determine a limited number of specific issues, provided always that it offers the appropriate guarantees (see *Lithgow and Others v the United Kingdom*, 8 July 1986, § 201, Series A no. 102). Article 6 does not therefore preclude the establishment

of arbitral tribunals in order to settle certain pecuniary disputes between individuals (see Suda v Czech Republic, no. 1643/06, para 48, 28 October 2010). Arbitration clauses, which have undeniable advantages for the individual concerned as well as for the administration of justice, do not in principle offend against the Convention (see *Tabbane v Switzerland* (dec.), no. 41069/12, para 25, 1 March 2016).

95. In addition, a distinction must be drawn between voluntary arbitration and compulsory arbitration. If arbitration is compulsory, in the sense of being required by law, the parties have no option but to refer their dispute to an arbitral tribunal, which must afford the safeguards secured by Article 6 § 1 of the Convention (see Suda, cited above, para 49).

96. However, in the case of voluntary arbitration to which consent has been freely given, no real issue arises under Article 6. The parties to a dispute are free to take certain disagreements arising under a contract to a body other than an ordinary court of law. By signing an arbitration clause the parties voluntarily waive certain rights secured by the Convention. Such a waiver is not incompatible with the Convention provided it is established in a free, lawful and unequivocal manner (see Eiffage S.A. and Others, cited above; Suda, cited above, para 48; R. v Switzerland, no. 10881/84, Commission decision of 4 March 1987, Decisions and Reports (DR) no. 51; Suovaniemi and Others, cited above; Transportes Fluviais do Sado S.A. v (dec.), no. 35943/02, 16 December 2003; and Tabbane, cited above, para 27). In addition, in the case of certain Convention rights, a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance (see Pfeifer and Plankl v Austria, 25 February1992, para 37, Series A no. 227, and Tabbane, cited above, para 27).'

On the conditions for the waiver of a right to a court and arbitration

'103. The Court will thus proceed from the assumption, in respect of both applications, that acceptance of the arbitration clause could constitute a waiver of all or part of the Article 6(1) safeguards. It must therefore determine whether that acceptance was the result of a 'free, lawful and unequivocal' choice, within the meaning of its case-law. To that end the Court finds it appropriate to compare the situations now before it with cases of commercial arbitration that it has previously adjudicated.'

The CAS is recognized as ‘tribunal established by law’

‘149. the CAS thus had the appearance of a ‘tribunal established by law’ within the meaning of Article 6 § 1.’

‘179. The Court would further observe that the principles concerning public hearings in civil cases, as described above, are valid not only for the ordinary courts but also for professional bodies ruling on disciplinary or ethical matters (see Gautrin and Others v France, 20 May 1998, § 43, Reports 1998III).

The right to a public hearing must be ensured in (sports) arbitration.

180. That being said, the Court has previously found that neither the letter nor the spirit of Article 6 § 1 prevents an individual from waiving, of his own free will, either expressly or tacitly, the entitlement to have his case heard in public (see Håkansson and Sturesson v Sweden, 21 February 1990, para 66, Series A no. 171-A).

181. That was not the situation in the present case, however. First, as the Court has already acknowledged, the recourse to arbitration was compulsory. Secondly, it is not in dispute that the applicant expressly requested a public hearing and that the request was denied, without any of the conditions enumerated in Article 6(1) being met.

182. The Court is of the view that the questions arising in the impugned proceedings – as to whether it was justified for the second applicant to have been penalised for doping, and for the resolution of which the CAS heard testimony from numerous experts – rendered it necessary to hold a hearing under public scrutiny. The Court notes that the facts were disputed and the sanction imposed on the applicant carried a degree of stigma and was likely to adversely affect her professional honour and reputation (see, mutatis mutandis, Grande Stevens and Others v Italy, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, § 122, 4 March 2014). Moreover, in spite of its somewhat formalistic conclusion, the Federal Court itself, in its judgment of 10 February 2010, expressly recognised in an obiter dictum that a public hearing before the CAS would have been desirable.

183. Having regard to the foregoing, the Court finds that there has been a violation of Article 6(1) of the Convention on account of the fact that the proceedings before the CAS were not held in public.'

Admissibility

The ECtHR found that Article 6(1) ECHR was *prima facie* applicable to the cases at hand, as they concerned the determination of 'civil rights' – proprietary rights in Mutu's case, and the right to practice one's profession in Pechstein's case.

Secondly, relying on its decision in *Ilascu v Moldova and Russia* [2004], the ECtHR held that it had jurisdiction on the basis that the SFT had 'failed to correct… a breach [of the ECHR] within the scope of its powers'. As such, Switzerland was the proper defendant in the action, despite the fact the issues originated with CAS.

Validity of consent to arbitration

While the ECtHR reiterated that the 'right to a court' is a crucial aspect of Article 6(1) ECHR, it continued by highlighting that this right is not absolute and it can be limited in a way which serves a legitimate aim and this aim is pursued proportionately.

Arbitration was held to be capable of falling into that scope. Importantly, however, the ECtHR distinguished between 'voluntary' and 'forced arbitration'. It noted that it is impossible to waive rights under Article 6(1) ECHR where arbitration is compulsory (namely, 'in the sense that [it] is imposed by law'), but reaffirmed its prior decision in *Eiffage v Switzerland* [2009] that a voluntary waiver of ECHR rights shall be valid where it is 'free, lawful and unequivocal'.

The ECtHR then considered the vital question of whether, in accepting CAS's jurisdiction, the applicants had voluntarily waived their rights under Article 6(1) ECHR. In examining the crucial criteria, the ECtHR disregarded case law on commercial arbitration, because it considered the situations of Mutu and Pechstein to be 'not comparable to those [commercial ones] just described'.

Therefore, the ECtHR performed an analysis on basic principles, holding – in what may prove to be a significant dictum for sports arbitration – that:

Contrary to the choice offered to the applicants [in the commercial cases cited above] – which had the opportunity to conclude a contract with one trading partner rather than with another – the only choice available to [Pechstein] was to accept the arbitration clause and be able to earn a living by practicing her discipline at the professional level, or to not accept it and have to completely give up earning a living by practicing her discipline at such a level.

In view of the restriction that the non-acceptance of the arbitration clause would have brought to the applicant's professional life, it cannot be said that the latter accepted this clause in a free and unambiguous manner.

The Court concludes that, although it was not imposed by law but by the rules of the ISU, the applicant's acceptance of the CAS's jurisdiction must be regarded as a 'forced' arbitration within the meaning of the case-law…This arbitration should therefore offer the guarantees of Article 6(1) ECHR.

Therefore, the ECtHR held that in Pechstein's case (one of clear 'forced arbitration') CAS should have offered all the guarantees of Article 6(1) ECHR.

In Mutu's case, however, due to the wording of Article 42 of the 2001 Regulation, it was not possible to describe it as a case of 'forced arbitration'. Nonetheless, given the way in which Mutu had requested the disqualification of an arbitrator during proceedings, and in light of *Suovaniemi v Finland* [1999], the ECtHR found that the waiver of the rights under Article 6(1) ECHR had not been 'unequivocal'. Thus, the arbitration proceedings in Mutu's case also had to offer all the guarantees of Article 6(1) ECHR.

An ECHR violation for lack of independence/impartiality?

Before considering whether CAS was 'independent and impartial', the ECtHR first had to consider whether CAS could be considered a 'tribunal established by law' – if not, it would be impossible for Article 6(1) ECHR's requirements to be satisfied. After having analysed the concepts of independence and impartiality, and having highlighted the importance of the principle that 'justice must not only be done, it must also be seen to be done', it conducted a brief analysis of CAS's status:

The CAS was the emanation of a foundation in private law… it enjoyed full jurisdiction to consider the basis of norms of law and, following an organised procedure, any question of fact

and of law which was submitted in the context of the disputes before it… Its decisions provided a jurisdictional solution to these disputes and could be appealed to the [SFT] in the circumstances exhaustively listed in [the Swiss Private International Law Act].

Moreover, the [SFT], in its settled case-law, regards the awards rendered by the CAS as 'real judgments, similar to those of a state court'.

The CAS, thus, appears to be a 'tribunal established by law' within the meaning of Article 6(1) ECHR.

In Mutu's case, the ECtHR dismissed the arguments against the independence and impartiality of two arbitrators on the CAS arbitration panel in his case. The fact that the first had sat on the panel which decided an earlier dispute in the same case was held insufficient to constitute a violation of the ECHR due to impartiality, as the legal issues were distinct. It was found that allegations that the second arbitrator was a partner in a law firm which represented the interest of Chelsea FC's owner were unproven. As such, there was no violation of Article 6(1) ECHR.

Pechstein's case was premised on not only the possible partiality of the president of the arbitral panel who ruled on her case, but also attacked the structure of CAS itself (as in the Pechstein German litigation). The first of these arguments was dismissed as 'too vague and hypothetical'. With regard to the structural concerns about CAS, the ECtHR also found that there was no breach of the requirements of independence and impartiality. In coming to this conclusion, the Court noted that, in the same way CAS is funded by international sports organisations, State courts are financed by the State – it does not necessarily mean that lack of independence interferes. It also considered the system for appointing arbitrators to be sufficiently independent/impartial. Hence, there was no violation of Article 6(1) ECHR on the grounds of a lack of independence/impartiality.

An ECHR violation for the lack of a public hearing?

As the ECtHR had found that Article 6(1) ECHR must apply to the CAS proceedings and given that the publicity of judicial proceedings is a fundamental principle enshrined in Article 6(1) ECHR, the fact that Pechstein was denied a public hearing, despite her explicit request to the contrary, was a clear violation of the ECHR.

Damages

The ECtHR considered Pechstein's application for damages under Article 41 ECHR. The ECtHR found 'no causal link between the violation and the pecuniary damage alleged by the applicant' as there was nothing to suggest that, if the arbitral award had been pronounced by an arbitral tribunal having ruled in open court, the conclusions of that arbitral tribunal would have been favourable to the applicant.

However, the Court did award EUR 8,000 for non-pecuniary damage.

d. Outcome at national level

Importantly, as reported by the Council of Europe, as the result of *Mutu and Pechstein v Switzerland*[233] new procedural rules allowing public hearings in disciplinary and/or ethics matters before the Court of Arbitration for Sport at the athlete's request were adopted in 2019.

[233] Council of Europe, Department for the Execution of Judgements of ECtHR, *Mutu and Pechstein v Switzerland,* <https://hudoc.exec.coe.int/eng?i=004-51485> accessed 30 November 2021.

Casesheet No 10 – Arbitrators as legal professionals of a different sort - classification of the individual arbitrator and the fault - Finnish Supreme Court, Roulas v Professor J Tepora

Reference case

Supreme Court of Finland, https://finlex.fi/fi/oikeus/kko/kko/2005/20050014

TRIIAL Database: https://cjc.eui.eu/data/data/data?idPermanent=120&triial=1

Core issues
Accountability of an arbitrator in *ad hoc* arbitration proceedings and question of permissible relationship between the arbitrator and parties prior to the dispute (impartiality).

At a glance

Country	Area	Reference to ECHR law	Legal and/or judicial body	Judicial InteractionTechnique	Remedy
• Finnland	• impartiality of arbitrators • accountabiility of arbitrators • liability of arbitrators under Finnish contract law	• Article 6 • Right to a fair arbitration	• Finnish Supreme Court	• Consistent interpretation	• NA

Case(s) description

a. *Facts & Summary of National Proceedings*

The *ad hoc* arbitration underlying this court proceeding arose from the share purchase agreement between three sellers and a company owned by a Finnish bank. The parties appointed two arbitrators, who then chose a chair of the panel, Mr Tepora. The panel issued an arbitral award against the sellers in 1995.

This award has been annulled by the Helsinki Court of Appeal on the grounds that Mr Tepora should have been disqualified due to conflict of interest with the respondent company because he provided an expert opinion to that company and other members of the group prior to and during the arbitration proceedings without disclosure. The sellers initiated another arbitration proceeding and sued Mr Tepora in court for damages. The case was heard by the District Court and then the Helsinki Court of Appeal that decided that the potential liability of Mr Tepora should be based on tort. This resulted in the dismissal of the claim.

b. Reasoning of the Court

The Supreme Court of Finland considered the case from the premise that the relationship between parties and arbitrators is contractual in nature.

The Court then decided that the annulment of the award following the arbitration proceedings was based on a fault which should result in the monetary contractual compensation of Mr Tepora to the parties. Mr Tepora was requested to pay around 81,000 EUR to the parties.

This decision clarifies the nature of the relationship between parties and arbitrators in *ad hoc* arbitration under Finnish law, which is based on the contract. As such, it may result in monetary compensation for the breach of the contractual duties by arbitrators.

c. Commentary and other relevant case law

The case exemplifies the strand in national case law focused on commercial arbitration emphasizing the limited application of the supranational case law to the procedural standards applicable to arbitration proceedings. Whereas it may be correct that the contractual obligations form the basis for the liability of the arbitrator, this does not exclude the examination of the position of the arbitrator (in the absence of rules on his conduct) from the perspective of Art. 6(1) ECHR and/or Art. 47 CFR. Given that the case originates from before the entry into force of the CFR and the extensive explanation of how Art. 6(1) ECHR should be applied to arbitration context, it serves as a good example of a limited approach that should not be followed in the current context.

Casesheet No 11 - 'Puma case': Judgement of the Spanish Supreme Court 102/2017, 15 February 2017 (so-called 'Puma case')

Reference case

Spanish Supreme Court, Judgment no. 102/2017 https://www.cremades.com/pics/contenido/7729b459e44f750f4ee0e6fe7d8e3c3e_398872_1.pdf (unofficial translation)

TRIIAL Database: https://cjc.eui.eu/data/data/data?idPermanent=121&triial=1

Core issues Accountability of an arbitrator according to the Spanish Arbitration Act 11/2011 on the basis of gross negligence.

At a glance

Country	Area	Reference to ECHR law	Legal and/or judicial body	Judicial InteractionTechnique	Remedy
• Spain	• impartiality of arbitrators • accountabiility of arbitrators • liability of arbitrators under Finnish contract law	• Article 6 • Right to a fair arbitration	• Spanish Supreme Court	• NA	• damages

Case(s) description

c. *Facts & Summary of National Proceedings*

The judgment in question refers to the arbitration proceedings between Puma AG RDS (Puma) and Estudio 2000 SA (Estudio 2000) which was a Spanish distributor of Puma's products. The two appellants in the case at hand were members of the arbitration tribunal (called in the judgments 'defendant-arbitrators') that on 2 June 2010 issued an arbitral award under which it ordered Puma to pay EUR 98 million to Estudio 2000 for the termination of the contract underlying the arbitration in question. It appeared that the arbitration tribunal rendered the award without the presence of the arbitrator nominated by Puma. The court proceedings revealed that the two arbitrators (Luis Jacinto Ramallo Garcia and Miguel Temboury Redondo) deliberately met in the absence of the third arbitrator (Santiago Gastón de Iriate y

Medrana), who was on a boat trip outside Madrid, and decided on the contents of the arbitration award, which were communicated to the parties the same day.

Puma sought to annul this arbitration award in the Provincial Court of Madrid. The Court indeed set the award aside in its judgment of 10 June 2011 (no 200/2011) 'on the basis that the arbitral tribunal had deliberated, voted and issued the award without the participation of the arbitrator appointed by Puma in breach of the principle of arbitral collegiality, which constituted an infringement of the right of defence and in turn a violation of public policy (see Article 41.1(f) of the Arbitration Law, and Article 24 of the Spanish Constitution).'

Estudio 2000 started new arbitration proceedings regarding the same claims, which ended with an award of compensation that was 60% lower than in the initial arbitration.

Puma started legal proceedings alleging that the two arbitrators in question should be held professionally liable for their misconduct and compensate Puma for the fees it paid to those arbitrators that amounted to 750,000 EUR each.

'On 20 September 2013 the Court of First Instance No. 43 of Madrid found the arbitrators-defendants liable (ordinary proceeding 1880/2012) on the basis that the award has been issued recklessly, finding that the Defendants had been guilty of a 'manifest, serious and inexcusable error in believing that they could issue a majority award without convening further with the third arbitrator.' 'The Judge noted that collegiality is a fundamental principle of arbitration, recognised in Articles 35 and 37 of the Spanish Arbitration Law, and furthermore that deliberation is the manner of forming the will of an arbitral tribunal, which is known by those, such as the Defendants, who are lawyers by profession. The court also made an award of costs against the arbitrators-defendants.'

This judgment was appealed by the two arbitrators in question.

The judgment was upheld by the Provincial Court of Appeal of Madrid on 27 October 2014 (Appeal 75/2014).

The judgment was again appealed in cassation by the two arbitrators in question.

d. Reasoning of the Supreme Court

The Supreme Court dismissed the appeals in cassation and agreed with the reasoning of the lower instance courts.

In particular, the Supreme Court decided that '2.- The Arbitration Law restricts the responsibility of the arbitrators to «damages caused by bad faith, recklessness or fraud» (Article 21 Arbitration Law), considering that only damages caused intentionally or by gross negligence can satisfy the liability demanded of arbitrators without threatening the necessary freedom of action for the exercise of the heteronomous power of the resolution of conflicts in accordance with the will of the parties. Imposing on the arbitrator the damages caused by negligence that do not involve a sufficiently characterised breach of their duties is contrary to the functional autonomy protected by the parties' freedom to agree that forms the basis of this institution (judgment of 22 June 2009).'

3.- Recklessness is not identified with the intention to prejudice, or with what the judgment of 26 April 1999 describes as «intentional harmful illegality», in the framework of a responsibility based exclusively on wilful misconduct and negligence, in which recklessness does not have to be intentional, especially after the judgment of 22 June 2009. Recklessness is equal to an inexcusable negligence, with a manifest and serious error, without justification, that is not linked to the annulment of the award, but to a perilous action on the part of those who know their office and should have respected it in the interest of those who entrusted them to carry out the arbitration. The conduct is of one who ignores, without respect for a minimum standard of reasonableness, the rights of those who commissioned the arbitration and the proper functions of the arbitrators; in summary, denaturalising the course of arbitration without any possibility that the award could be properly issued, as it happened in this case, with the consequent damage. Ultimately, it was extraordinary or unforeseen conduct that is beyond the good judgment of anybody.

It is unacceptable that those who have clearly violated the rules of arbitration, then rely on them by proposing an interpretation that, if it were admitted, would invalidate the very essence of what constitutes the deliberation and decision of all the members of an arbitral or judicial tribunal, and which is inseparable from the principles of collegiality and of contradiction between all of them through the deliberation process and the taking of the responsibility for decisions when more than one arbitrator is involved, confusing the essential question of making

or adopting the decision of the collegiate body, with the need to constitute a certain majority for it to take effect.

It is not possible to carry out the rule of two against one by the elimination of the third arbitrator from the deliberations and the voting, nor is it in the judgment of 21 March 1991, which has nothing to do with this case. In the judgment of 21 March 1991, there was a deliberation and vote on the award by all of them, although it was drafted by those who voted in favour, which is different from two arbitrators excluding the third one from the deliberation and vote of the award. Nor does the Law require that the arbitrators deliberate the award all together, regardless of whether there is unity of opinion.'

The Court stated that deliberation and voting 'operates as a means of internal control of its members […]. In other words, it is not the case of that, once the possibility of the majority has been envisaged, or by the agreement of those who support a particular proposal or decision, the participation of the remaining members can be rejected '*ad limite*' since they have the right and obligation to know […] the internal reasons that justified the decision and final vote'. This resulted in the confirmation of the liability of the arbitrators in question that were ordered to cover the costs of the proceedings.

e. Commentary

This decision is of great significance. Although some national laws provide for some forms of liability of arbitrators, it is usually not common practice for courts to hold arbitrators liable. This case led to a different conclusion. The fact that the arbitrators were held liable in the case at hand triggered a vivid reaction within the international arbitration community who saw this judgment as potentially endangering Spain's reputation as an arbitration-friendly seat.

Still, what stands out is the lack of references to the supra-national standard of fair trial, thus maintaining the separation in the role and treatment of commercial arbitrators and non-commercial arbitrators and judges.

Part III. Training hypotheticals

For Discussion of Case Study 1 - Assessing the guarantees of judicial independence and impartiality in a legal system of another Member States as preconditions of mutual trust European Arrest Warrant (Hypothetical: The doubts of Judge Van Gend)

Judge Van Gend, from the Member State Law Land, must decide on the execution of three EAWs coming from the Member States Far East, Far West and Deep South.

1. The request of surrender to Far East

The first EAW was issued by a district court of Far East against Mr Baumbast, with a view to prosecuting him for illicit trafficking in narcotic drugs.

Judge Van Gend notices that the EAW was issued on the basis of a national arrest warrant *issued* by a police service of King Town, the capital of Far East, and *confirmed* by the Public Prosecutor's Office of King Town.

Judge Van Gend seeks information from the authorities of Far East about the role of the Public Prosecutor's Office. The answer he obtains is that the Public Prosecutor's Office is independent from the executive, ensuring that the police complies with the law within the investigative phase, and through the confirmation it verifies and validates arrest warrants issued by the police.

Please, assume you are either Judge Van Gend or the defendant of Mr Baumbast and consider whether the requirement that the EAW is issued on the basis on a 'judicial decision' is satisfied (see EAW Framework Decision, Article 8(1), under c).

2. The request of surrender to Far West

The second EAW was issued by a first instance criminal court of Far West against Mr Costa, for conducting criminal prosecutions for counterfeiting of sanitary masks and other medical devices useful in the fight against Covid-19.

Mr Costa does not give his consent to his surrender. In support of his opposition, he submits that, because of the reform concerning the procedure for appointments of judges in Far West, his right to a fair trial would not be guaranteed. Notably, he considers that the role entrusted to the Prime Minister in that procedure amounts to an unlawful interference of the executive over the independence of the judiciary.

The new procedure for appointments of judges sitting in first instance criminal courts is as follows:

- judges are appointed by the President of the Republic, based on a proposal of the Prime Minister;

- any candidates for judicial office must satisfy the requirements of professional experience identified by the Constitution;

- a Judicial Appointments Committee must give an opinion on each application submitted;

- as a rule, the Prime Minister will submit to the President candidates put forward by the Judicial Appointments Committee;

- under certain circumstances, the Prime Minister may submit to the President candidates not put forward by the Judicial Appointments Committee.

Please, assume you are either Judge Van Gend or the defendant of Mr Costa and consider how the two-step test established by the Court of Justice in Case C-216/18 PPU LM can be approached.

3. The request of surrender to Deep South

The third EAW was issued by a first instance criminal court of Member State Deep South against Ms Defrenne, for the purposes of executing a detention sentence of one year and three months for defamation through press. The woman is a brilliant journalist, known for her sarcastic comments on politicians (from any parties).

In 2019, she wrote an article in the online, free access journal 'The Watchdog', concerning the composition of the new Government of Deep South, which includes only two female ministers out of sixteen, in charge for the Department for Equal Opportunities and the Department for

Youth Policies. At the end of the article, she commented that the Prime Minister, Mr Snowball, was right in appointing only two female ministers, because, considering his scarcity in leadership, he would have been hardly able to emerge in a government with more women and/or women responsible for crucial departments.

Please, assume you are either Judge Van Gend or the defendant of Ms Defrenne and consider whether the execution of the arrest warrant could be refused, on grounds that the conviction of Ms Defrenne is a violation of her freedom of expression.

For Discussion of Case Study 2 – Assessing a position of a body in a system of judicial and quasi-judicial bodies with a view of qualifying it as a court or a tribunal under Art. 267 (Hypothetical: Judge Salmon Pravy)

Solomon Pravy has been a judge in a district court of Xin'trea, the capital city of Cintra, a Member State of the European Union. After five years of adjudication in the court of first instance, he decided to apply for a position in a regional court of appeal at the time when two vacant positions were open. Judge Solomon Pravy was very hopeful about his promotion given the fact that he was ranked first by the Council of the Judiciary.

In Cintra the decision as to whether a judge is appointed to a court of a higher level is taken by the President of National Judicial Office (NJO), a body responsible for the organisation of courts, subject to a limited scrutiny from the Supreme Court's Disciplinary and Judges Chamber. The latter may only request explanation of the decisions made by the President of NJO and there is no path of appeal available for judges whose application was rejected.

Indeed, judge Salomon Pravy's application was rejected bluntly with the President of NJO justifying his decision with: *'changes in caseload and organising work following the publication of the calls, there is no need to fill the vacant positions'*. No individualised assessment of application was provided.

Needless to say, judge Salomon Pravy seeked remedy before Cintra's courts.

1. Consider the case study in abstract – on which grounds would judge Salomon Pravy make his case?

2. As a judge of a district court consider the Judge Pravy's procedure of the appointment of a judge to the court of a second instance in the light of the European Union standard of judicial independence with the focus on judicial appointments.

a. How would you frame the link with the European Union law and in particular with the Charter of Fundamental Rights?

b. Which judgements could act as a reference point and how?

c. How would you incorporate the standard in the assessment of the national situation at stake?

d. Which judicial interaction techniques could serve the purpose?

3. Could Supreme Court's Disciplinary and Judges Chamber be considered 'a court or a tribunal' in the understanding of Art. 267 TFEU?

For Discussion of Case Study 3 – Defending the position of a singular judge – Disciplinary measures, Freedom of expression of judges & Irremovability from the office **(Hypothetical: Slips of the tongue)**

Layer 1

A judge was interviewed by a newspaper as regards the recent judicial reforms occurring in his country. His comments were published without modifications. The statements of the judge showed that he had some doubts about the legitimacy of the activities of the major party composing the Government, in particular the lawfulness of the process leading to the adoption of different acts. These acts adopted separately had the aim to change altogether the legal status of the judiciary. A couple of days after, the judge posted the link to his interview on his Twitter account, triggering a wide debate among the followers. A poll analysis published after a few days showed a decrease of support with respect to the majority party. One politician, representative of the party, affirmed that such a decrease was a clear effect of the statements made by the judge.

The Council of the Judiciary started a disciplinary proceeding against the judge based on the defamatory potential of the judge's expressions. This decision was then reversed by the Supreme Court that found a violation of the freedom of expression of the judge.

Do you think the Supreme Court should decide granting safeguards for the protection of the freedom of expression of the judge and on the basis of which criteria?

Questions guiding the discussion:

1) Do you think that judges should participate in the public debate, or should they remain silent/use discretion (to ensure their impartiality)?
2) Should the applicant be a prosecutor, would her/his declaration in both cases lead to a different conclusion?
3) In the affirmative case, which requirements or objective criteria do you envisage for the participation of judges in the public debate?
4) Are they applicable only when the judge is expressing his/her own opinion on a case or on topics of general interest or in any other case?

5) Can freedom of expression of judges encompass statements with defamatory potential? How can you see the relations with the two issues in this particular case?
6) Is there a distinction in assessing the limits of freedom of expression when using social media?
7) Should the national court have some doubts about the applicability of EU law to the facts of the case, since the disputed legislation on defamation provided for subjective exceptions related to freedom of expression, would you envisage any questions based on which the national court could ask for a preliminary ruling to the CJEU interpreting this legislation in light of Art. 11 EU Charter of Fundamental Rights?

EU FRC Art. 11

FREEDOM OF EXPRESSION AND INFORMATION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference with public authorities and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

ECHR Art. 10

FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for

the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Guidelines for discussion:

The hypothetical case is based on elaboration of facts and issues from various ECtHR and national cases which have been summarised in the TRIIAL Overview of European and domestic caselaw on accountability and freedom of expression available in the apogee platform, in particular have a look at the case sheets no. 4, 5 & 7.

In addition to training materials, please look at this relevant source (in particular, pp. 76-86): Guide on Article 10 of the European Convention on Human Rights, https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf

The issues related to defamation and disciplinary sanctions are strictly related to national contexts and related legal frameworks. For this reason, we did not include related legal sources.

Given the aforementioned facts, trainees are invited to take into account the following aspects:

- whether there is a legal basis for initiating the disciplinary proceeding in your view (also recalling what you have done in Hypo 1) and which kind of disciplinary proceedings would you have in mind in case of defamatory contents delivered by magistrates;
- which elements should be taken into account to assess whether a judge's statement is defamatory with respect to the aforementioned political party;
- how should the balance between the right of information and freedom of expression should be framed with regards to magistrates;
- whether there is a duty of discretion of magistrates and in what actions would it consist of;
- which elements should be taken into account as regards freedom of expression (e.g. professional duty of the judge to express opinions on legislative reforms, professional duty to inform the press, consequences of the expression used, consequences of the interference for the judge and for society, words and tone used, national historical, social, political context);

- which cases of the ECtHR mentioned in the relevant materials could be more helpful in addressing this issue?
- which type of remedies – including disciplinary measures - can be applied in case of defamation? Does it make any difference should the subject involved is a political party or a politician?
- could there be a different analysis in case of statements published only in twitter posts?

In solving this case, please take into account also the relevant standards to assess the lack of independence or impartiality that give rise to issues regarding judicial accountability.

In particular, while addressing the legal issues presented in the case, please identify the risks threatening the freedom of expression of magistrates and their accountability both as a whole and as individual magistrates. Once this task is accomplished during discussion, please identify the measures through which these risks can be improved.

Layer 2

Let’s imagine a different situation. A judge expressed his opinion on the Nazi genocide on a social network. His statements are the following: ‘Nazi crimes are a fake news and all the action undertaken by single individuals to seek compensation for damages are a way to profit from historical uncertain facts’. The judge was at that time deciding a case regarding the compensation for damages deriving from the Nazi genocide. The Council of the judiciary started a disciplinary proceeding against the judge based on the qualification of the expression as negationist declaration. Afterwards, a person who sought compensation for damages for being victim of a Nazi crime sued the social network asking for the removal of unlawful contents and the Court issued an order asking the social network to remove contents worldwide.

Questions guiding the discussion:

1) Do you think that judges may express their opinions on the cases they are deciding?
2) Which are the criteria for the expression of personal opinions in this case?
3) When freedom of expression can be qualified as hate speech?
4) Do you think that stricter standards for hate speech should be applicable to judges?

For Discussion of Case Study 4 – Actors in defence of rule of law - assessing the guarantees of judicial independence and impartiality in one's own legal system (Hypothetical: Judge Femke Calanthe of Nilfgaard)

Judge Reynevan van Bielau has just been appointed to the district court of Xin'trea, the capital city of Cintra.

The judicial appointment of Judge van Bielau was one of the first to be decided upon by the Council of the Judiciary in Cintra re-established following the major reform that affected almost all levels of the judiciary.

Before his appointment he was an academic working in the chair lead by Prof. Narrenturm, who has become the President of the Council of the Judiciary. Van Bielau is said he will also join the reformed body as soon as its composition is changed.

Please assess whether the appointment of Judge van Bielau from the perspective of the standard of judicial independence emerging from the case law of European courts.

Which cases would fall within the field of EU law (as per art. 19(1) second) and could be adjudicated by Judge van Bielau?

Do the rules on the process of judicial appointment incl. functioning of the appointing body 'dispel any reasonable doubt in the minds of litigants as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it' (Land Hessen, C-272/19, point 52)?

Consider that the Council of the Judiciary in Cintra is working according to the following rules:

Under Article 3 of the Law on the Cintra Council of the Judiciary (CCJ):

> '1. The Parliament shall elect, among the judges of the Supreme Court and of the ordinary, administrative and military courts, 15 members of CCJ for a collective term of four years. *(NOTA BENE: the term of the Parliament in Cintra lasts five years)*
>
> 2. In the election referred to in paragraph 1, the Parliament shall, as far as possible, take into account the need for representativeness within CCJ of various types and levels of the courts.

3. The collective term of the new members of CCJ elected among the judges, shall begin the day following their election.

31 Under Article 4 on the Law on CCJ, candidates for the post of member of the KRS, chosen among the judges, may be presented by a group of at least 2 000 Polish citizens or by a group of at least 25 judges in active service.

32 In accordance with Article 34 of the Law on the CCJ, a panel of three members of the KRS is to adopt a position on the assessment of candidates' suitability for the post of judge. Should their decision be inconclusive the President will decide as to the suitability of the judge.

33 Article 24 of the Law on CCJ provides:

'1. Where several candidates have applied for a post of judge or trainee judge, the group shall draw up a list of recommended candidates.

2. In determining the order of the candidates on the list, the group shall take into account, in the first place, the assessment of the candidates' qualifications and it shall also consider:

(1) the professional experience, including experience in the application of legislative provisions, academic output, the opinion of his or her superiors, letters of recommendation, publications and other documents enclosed with the application form;

(2) the opinion of the general assembly of the relevant court and the evaluation of the relevant general assembly of judges.

3. The absence of any of the documents referred to in paragraph 2 shall not constitute an obstacle to the drawing up of a list of recommended candidates.'

34 Under Article 37(1) of the Law on CCJ:

'If several candidates have applied for a single post of judge, the CCJ shall examine and evaluate all the applications lodged together. In that case, [the KRS] shall adopt a

resolution including its decisions for the purposes of presenting one appointment proposition to the post of judge in respect of all candidates.'

35 Article 42 of the Law on CCJ provides:

'1. An applicant may bring an action before the Supreme Court on the ground of the illegality of the CCJ's resolution unless specific provisions provide otherwise. …

Judge Femke Calanthe of Nilfgaard, a Member State of European Union neighbouring Cintra has received the EAW issued in case of Geralt Rivia, a very efficient cross-border car thief. The warrant was issued by judge Reynevan van Bielau and it is a fourth EAW Nilfgaard's courts received and promptly enforced.

Given your assessment of the procedure of judicial appointments in the light of the case law of European courts, assess the risk of breach of fundamental rights in cases such as the one at hand in line with the case law of the CJEU, in particular as it was recalled in para 52 of Joined Cases C-354/20 PPU and C-412/20 PPU:

'In that regard, it should be recalled that, in the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 79), the Court held that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that **there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which the European arrest warrant was issued, and in the light of the information provided by that Member State pursuant**

to Article 15(2) of that framework decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State.'[234]

In a specific context of the assessment of an independence of a body appointing a specific judge, how would you proceed to establish the existence of the risk in the contexts necessitating mutual trust and, therefore, recognition of the judgements. How would you apply the standard emerging from European courts jurisprudence to the case at hand?

In continuation of the Case Study 3

In his appointment to the court in the capital city of Cintra, Judge van Bielau beat three female judges who though ranked below him, had a minimally lower number of points in ranking evaluation. Importantly, the ranking points were lost by them due to the fact that at the time of their traineeship they all were pregnant and, therefore, required additional time to complete their training. As the result all three of them were appointed to courts outside of the capital city.

All three female judges challenged appointment decision, however, to no avail

Would you consider that the matters related to discrimination on grounds of sex belong to the range of matters governed by EU law?

Should rules on the process of judicial appointment such that 'dispel any reasonable doubt in the minds of litigants as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it' (Land Hessen, C-272/19, point 52) guarantee also equal treatment?

[234] Joined Cases C-354/20 and C-412/20 PPU - *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission) L and P* (n 116).

For Discussion of Case Study 5 – Searching for analogies –case of arbitration and alternative dispute resolution (Hypothetical: Frutolis)

Frutolis is the largest supermarket chain in the country of Varvencia. Frutolis has long been cooperating with StrawBerries, headquartered in Akancia, under a supply contract entered into in 1990. The contract includes an arbitration clause with the following wording:

'All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with the said Rules.'

Varvencia is a civil law jurisdiction, while Akancia is a common law jurisdiction. Both Varvencia and Akancia are members of the European Union and arbitration laws of both countries are based on the UNCITRAL Model Law. Neither Varvencia's arbitration law nor its Code of Civil Procedure of 2001, regulates the scope of civil liability of arbitrators or arbitral institutions. Art. 1056 of Varvencia's Civil Code of 2005 states that 'no professional contractor shall fully exclude its liability for the performance of its essential contractual duties.' Akancia's law provides for immunity from civil liability for both arbitrators and arbitral institutions.

On 11 November 2016, Frutolis terminated the contract with StrawBerries without cause. Consequently, StrawBerries initiated arbitration proceedings against Frutolis before the ICC on 13 March 2017, which is when the ICC Secretariat received the Request for Arbitration. Because the parties failed to nominate an arbitrator, the ICC court appointed Ms. Helen Petrowski as sole arbitrator.

The arbitration was quite lengthy. Following the procedural conference of 4 May 2017, Ms. Petrowski issued 10 procedural orders, held 2 hearings and received 24 submissions: 12 from Frutolis and 12 from StrawBerries. In the course of the proceedings, StrawBerries requested that the Secretariat extend the time limits for all its submissions (12 times in total) and all extensions were granted. Frutolis did not object to those extensions. The first hearing was held in person (the parties' request for an online hearing was refused by Ms. Petrowski), while the second hearing took place remotely due to the outbreak of a new virus. The sole arbitrator rendered an award on 15 March 2021 (almost four years after the proceedings started).

Pursuant to the award, StrawBerries was awarded 536,000.00 EUR in monetary damages for the unlawful termination of the contract by Frutolis. Frutolis disagreed with the calculation of damages and sent a request to the ICC Secretariat for the interpretation of the award. The request was dismissed by Ms. Petrowski. Consequently, Frutolis initiated a civil liability action against Ms. Petrowski and the ICC before the court of Varvencia for violating their respective duties in arbitration by (1) organizing excessively lengthy proceedings and (2) miscalculating the damages.

Article 41 of the ICC Rules: Limitation of Liability
The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

Based on your knowledge of the topic, discuss the case providing arguments in favour or against (or both), depending on your role as:

1. The suing party, Frutolis.
2. The sued arbitrator, Ms. Petrowski.
3. The sued arbitral institution, the ICC.
4. The court deciding the case.

The three questions that we want to address in the plenary based on the case.

- Can arbitrators be held liable and if so on what grounds?
- Can arbitral institutions be held liable and if so, on what grounds?
- What is the basis for civil liability of arbitrators and arbitral institutions?

Part IV Conclusions: Learning from jurisprudence and anticipating the future[235]

This casebook constitutes one of the final deliverables of TRIIAL project, complementing the database featuring national and supranational case law[236], national rule of law reports,[237] e-learning platform and, finally, the guidelines for trainers[238]. Given the substantial output of the project, in this deliverable the authors refrained from giving the complete overview of the case law amassed in the process of research and training, but instead decided to present the selected cases illustrating case studies based on 'scenarios' – recurrent patterns where the adjudication concerning judicial independence, impartiality and accountability arise. The case studies were identified both from the top-down perspective (thus looking closer at the case law of CJEU and ECtHR) and from the bottom-up perspective (thus scrutinising national case law emerging from courts of all levels). Thus, we look at a case study 1 where the legal system of another Member State is assessed in order to ensure mutual trust; case study 2 where case law focuses on the positioning of a body as a court or a tribunal within the understanding of Art. 269 TFEU; case study 3 addressing the position of a singular judge, case study 4 looking at the case law from the perspective of the parties initiating procedures and case study 5 assessing the extent to which the existing standard of judicial independence can be applied to arbitration (understood broadly).

The idea behind this selection is to induce both trainers and lawyers of all professions to analyse the cases in their own files from a rule of law perspective in relation to the standard of fair trial demanding that courts are independent, impartial and accountable: in the presence of the three mutual trust between jurisdictions may thrive.

Firstly, as it has been emphasized in all instances of TRIIAL project,[239] the characteristic feature of the case law of European courts is the deference to states as chief actors in adopting specific approaches and rules on organisation of the judicial system, specifically the system of judicial appointments as judges and within the system of the judiciary, rules on irremovability

[235] Echoing the title of M. Bonelli, 'Let's take a deep breath: on the EU (and academic) reaction to the Polish Constitutional Tribunal's ruling' op. cit. (n 157).
[236] Centre for Judicial Cooperation Database accessible at <https://cjc.eui.eu/data/data?type=triial&country=all>.
[237] As per 30 June 2022 included in the deliverables on the project website, subsequently to be published as EUI working papers.
[238] As per 30 June 2022 included in the deliverables on the project website, subsequently to be published as EUI working papers.
[239] See, for instance the Welcome to TRIIAL Module by Madalina Moraru 'Accountability and Freedom of Expression of Magistrates in Europe'.

from the office, rules on the judicial accountability and impartiality. This remains to be a clear competence of states parties to ECHR and Member States of the European Union. However, the case law has gradually clarified the extent of obligations of states should they comply with Art. 19(1) second paragraph TEU interpreter in the light of Art. 47 and 48 CFR and with Art. 6(1) ECHR.

With the evolution of the case law, therefore, we have seen the more profound understanding of the scope and content of obligations of the states with respect of organising the system of rules governing administration of justice.

The case law concerning organisation of judicial system will continue to exert a significant impact on judicial, policy, and academic discussions giving voice to the anxiety about and imagining the shape of Europe and of the European Union in the future. For legal professionals it is, however, time of taking a deep breath and engaging further in shaping this future using the judicial dialogue and dialogue among legal professionals, both in their formalised and informal shapes as a chief tool for this common endeavour. We hope that results of TRIIAL project have contributed to this discussion in the duration of the project and will continue to serve legal professionals in the ongoing struggle to uphold and shape European values.