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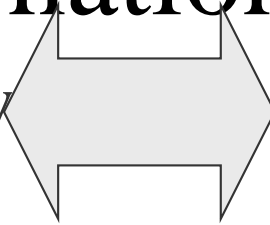
Independence and impartiality of tribunals in the CJEU case law

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The impact of international law on national law - UK

➤ National law  international law

- Concept of judicial independence originates from England (1701):
 - it impacted the thinking of political leaders in the transnational level
 - the international community embodied the principle of judicial independence into international treaties
- The international law of judicial independence has impacted the domestic law: UK introduced ECHR into the British domestic law (1998; British Constitutional Reform Act, 2005)

Article 47(2), CFR

- ✦ Everyone is entitled to a fair and public hearing within a reasonable time by **an independent and impartial tribunal** previously established by law. /.../



Tribunal/court

- **CoE and EU law** use the term tribunal rather than court. The word ‘tribunal’ is given an **autonomous meaning**, and the CJEU has applied consistent principles in determining whether a body qualifies as a tribunal.
- Not necessarily a court of classic kind

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Why autonomous interpretation?

Let's think about...

- Who adopts the law?
 - The Council (+ the EP) - qualified majority vote
- Who applies the law?
 - national authorities (courts) all around Europe (27)
- How?
 - In a different (their own) way (?)
- In order to achieve rights and duties deriving from EU measures are applied uniformly and equally across the EU

esf evropský sociální fond v ČR EVROPSKÁ UNIE MINISTERSTVO ŠKOLSTVÍ, MLÁDEŽE A TĚLOVÝCHOVY INVESTICE DO ROZVOJE VZDELÁVÁNÍ

What defines “tribunal” in the ECtHR case law?

- established by law
- the power to issue binding decisions
- independence and impartiality
- the ability to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner
- having full jurisdiction over the case
- the duration of its members’ terms of office

What defines “tribunal” in the CJEU case law?

The CJEU has addressed the meaning of ‘tribunal’ in the context of deciding whether a particular entity is permitted to refer a case to the CJEU for a preliminary ruling

The body must:

- be permanent
- be established by law
- be independent and impartial
- have compulsory jurisdiction
- include an *inter-partes* procedure
- apply rules of law

CJEU: Examples

- Does Court of Auditors qualify as a tribunal?
(CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, 19 December 2012, paras. 19-31)
- Does a Commission for Protection against Discrimination qualify as a tribunal? (CJEU, C-394/11 *Valeri Hariev Belov v. CHEZ Elektro Balgaria AD and others*)
- Does an arbitral body qualify as a tribunal? (CJEU, C-555/13, *Merck Canada Inc. v Accord Healthcare Ltd and Others*, 13 February 2014, paras. 18–25)

*Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai
Tourismou v. Ypourgeio Politismou kai Tourismou - Ypiresia
Dimosionomikou Elenchou*

- The CJEU ruled that the Court of Auditors did not constitute a tribunal because: (i) it had ministerial links, which meant it was not acting as a third party in relation to the interests at stake; (ii) its jurisdiction was limited to *a priori* auditing of the state's expenditure, and did not include making a determination; (iii) its decision did not acquire the force of *res judicata* and its proceedings were not intended to lead to a decision of a judicial nature; and (iv) the beneficiary of the expenditure at issue was not a party to the proceedings before the Court of Auditors.

Merck Canada Inc. v Accord Healthcare Ltd and Others

- **“The jurisdiction of the *Tribunal Arbitral necessário* does not stem from the will of the parties, but from Law No 62/2011 of 12 December 2011. That law confers upon that tribunal compulsory jurisdiction to determine, at first instance, disputes involving industrial property rights pertaining to reference medicinal products and generic drugs. In addition, if the arbitral decision handed down by such a body is not subject to an appeal before the competent appellate court, it becomes **definitive and has the same effects as a judgment handed down by an ordinary court.**”**

Why is independence important?

- The **purpose** of independence is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence
- Judicial independence is therefore a **pre-requisite to the rule of law**

Impartiality/independence

- CCJE (Opinion No. 1, 1994): “The judicial independence serves as the guarantee of impartiality.”
- CCJE (Opinion No. 3): “The judicial independence is a pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.”
- They are tightly **intertwined and functional in character**: they are means protecting the ability of the judge to perform the relevant judicial function
- **Independence**: no outside source, which would prevent the judge from performing his function
- **Impartiality**: individual quality of a decision-maker who is free from irrelevant pressures with regard to the decision to be taken (towards himself, parties, lawyers, public opinion)

Independence

- **Legal** elements: institutional framework establishing legislative provisions and constitutional safeguards of judiciary and judges
- **Ethical** elements: incorporates the qualities necessary to achieve the end - the protection of the rights of citizens
- Independence:
 - of the **judiciary as a body**
 - **individual**
- G. Guillaume: “The judge who wants to be independent is independent.”
- Irmgard Gris: “To be a good judge is a matter of character.”



Is there a potential
threat to judicial
independence if
there is decrease of
salaries of
judges???



Example

Facts:

The Portuguese legislature temporarily **reduced the remuneration** of a series of office holders in the public sector, including the **judges** of the Court of Auditors. The Trade Union of Portuguese Judges, acting on behalf of those judges, brought an action before the Supreme Administrative Court of Portugal seeking the annulment of those budgetary measures. The ASJP contended that the **salary-reduction measures infringed ‘the principle of judicial independence’** enshrined not only in the Portuguese Constitution but also in EU law.



Is the organisation of the judiciary in MS the EU's business?

- ✦ CJEU: “To the extent that the Court of Audits may, as a ‘court or tribunal’, rule on questions concerning the application or interpretation of EU law Portugal must ensure that the court meets the requirements essential to effective judicial protection. Maintaining such a court’s independence is essential and inherent in the task of adjudication. It is required not only at EU level, but also at the level of the MS and, therefore, as regards national courts. **It is essential to the proper working of the judicial cooperation system between national courts and the CJEU.**”

- ✦ **The external aspect** of judicial independence presupposes that the court concerned exercises its 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 being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

- ✦ That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as **guarantees against removal from office. Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to judicial independence** (*Associação Sindical dos Juizes Portugueses*, C-64/16, paras. 44-45). “

Epilogue

- **However, the CJEU holds that the salary-reduction measures at issue cannot be considered to impair the independence of the members of the Court of Audits. Those measures were applied not only to the judges, but, more widely, to various public office holders performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary. They are, therefore, in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort dictated by the mandatory requirements for reducing the Portuguese State's excessive budget deficit. In addition, the measures at issue were temporary in nature.**

National courts are to ensure “the full application of European Union law (...) and (...) judicial protection of an individual’s rights under that law” (*Opinion 1/09*, § 68). If politicians can influence courts’ decisions, they can use this leverage to pursue sheer protectionism, instead of advancing the interests linked to the EU internal market. In addition, deficiencies of judicial independence in one MS entail problems for the courts in other MS, as the latter are obliged to recognize and enforce judicial decisions coming from other EU MS. Should the courts trust the judgments from the State in which the division of powers is blurred?

MS and their legal orders differ as to the substance and procedures, ways and level of protection of fundamental rights, court organisation and the expediency of proceedings.

These differences are treated as diversity and have not prevented the EU from establishing the European area of justice based on mutual trust and mutual recognition of judgments. **How to find the limits of States’ freedom to organise their judiciary?**

How to differentiate between a “reorganisation” and a breach of the rule of law? Is the EU (and if yes, who exactly – Council, CJEU?) legitimized to make such a decision?

And what consequences should be drawn if a breach of the rule of law is established?

These issues can be important for all 24 EU acts introducing mutual recognition of judgments (more than 20 instruments with regard to cooperation in civil and criminal matters). The *LM* case arose in the context of one of them – the European Arrest Warrant (EAW) Framework Decision.

Example: LM case (C-216/18 PPU)

- ✦ The CJEU was asked by an Irish court to address one of the most serious current legal challenges of the EU: the consequences of restrictions imposed upon judicial independence in one MS for other MS. The sequence of laws adopted in 2015-2018 in Poland has been assessed commonly by various external and internal institutions as “enable(ing) the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice and thereby pos(ing) a grave threat to the judicial independence as a key element of the rule of law”

- According to the judgment, national courts should apply **both steps of the *Aranyosi* test** when judicial independence in the issuing country is endangered. If the executing court possesses a strong evidence of systemic or generalised deficiencies in this respect, it should proceed to the second step – of individual case assessment: “the executing judicial authority must refrain from giving effect to the European arrest warrant” only if there are substantial grounds for believing that that person will run a real risk of a breach of the fundamental right to a fair trial (§ 78 and 59).

Example: Commission v Poland

(C 192/18)

Facts:

In 2017, a Polish law lowered the retirement age of judges and public prosecutors, and the age for early retirement of judges of the Supreme Court to 60 years for women and 65 years for men, whereas those ages were previously set at 67 years for both sexes. In addition, that law conferred on the MoJ the power to extend the period of active service of judges of the ordinary courts beyond the new retirement ages thus set. Since the Commission took the view that those rules were contrary to EU law, it brought an action (Article 258 TFEU) for failure to fulfil obligations before the CJEU.



Infringement of Article 19 (2/2) TEU

Judicial independence requires that the court concerned exercise its functions wholly autonomously and in an impartial manner. The fact that an organ, such as the MoJ, is entrusted with the power to decide whether or not to grant an extension to the period of judicial activity beyond the normal retirement age is not sufficient in itself to conclude that the principle of independence has been undermined. However, it finds that the substantive conditions and detailed procedural rules governing that decision-making power are, in the case in point, such as to give rise to reasonable doubts as to the imperviousness of the judges concerned to external factors and as to their neutrality. First, **the criteria on the basis of which the minister is called upon to adopt his decision are too vague and that decision does not need to state reasons and cannot be challenged in court proceedings. Second, the length of the period for which the judges are liable to continue to wait for the decision of the minister falls within the latter's discretion.**

The necessary imperviousness of judges to all external intervention or pressure requires guarantees against removal from office. **The principle of irremovability requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate**, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. In the case in point, the combination of the measure lowering the normal retirement age of judges and of the measure consisting in conferring upon the MoJ the discretion to authorise them to continue to carry out their duties beyond the new retirement age thus set, for 10 years in the case of female and 5 years in the case of male judges, fails to comply with the principle of irremovability. That combination of measures is such as to create reasonable doubts regarding the fact that the new system might actually have been intended to enable the minister to remove certain groups of judges while retaining other judges in post.

Impartiality



“I’m recusing myself from this case.”

➤ **EU law** has consistently followed the principles established by the ECtHR’s case law regarding the two required aspects of impartiality: subjective and objective impartiality.

Impartiality – subjective/objective test

➤ The **subjective** impartiality (relating to an individual judge's personal prejudices or bias) is presumed as long as the contrary has not been proved

➤ **Objective** test: account must be taken of considerations relating to the functions exercised and to internal organisation.

“Justice must not only be done; it must also be seen to be done“.
to be done“.

ECtHR: Impartiality – objective test

- **Piersack v. Belgium:** “What is at stake is the confidence which the courts in a democratic society must inspire in the public.”
- **Hauschildt v. Denmark:** “The fear that the judge or tribunal lacks impartiality must be such that it can be held to be objectively justified; the standpoint of the accused on this matter, although important, is not decisive.”
- **De Cubber v. Belgium:** One of the three judges of the criminal court who had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question. (...) “Even appearances may be important ...”

- How about this?



CJEU: Example

- Case *Chronopost SA and La Poste v. Union française de l'express* concerned a claim that infrastructural assistance constituted state aid. The case had twice been before the Court of First Instance, with a different judicial composition but the same Judge-Rapporteur. At the second hearing, the court affirmed its first ruling, namely that there was state aid. The appellants claimed that the second court was not an impartial tribunal because it included the same Judge-Rapporteur and the decision was tainted with bias.
- The CJEU set out the **test for impartiality** as follows: (i) the members of the tribunal must be subjectively impartial, that is, none must show bias or personal prejudice (there is a presumption of personal impartiality in the absence of evidence to the contrary); and (ii) the tribunal must be objectively impartial by offering guarantees sufficient to exclude any legitimate doubt in this respect. The CJEU dismissed the allegation of bias. The facts did not establish that the Chamber's composition was unlawful.

