

THE OBLIGATION TO ESTABLISH AND UPHOLD JUDICIAL INDEPENDENCE UNDER ARTICLE 19(1) TEU

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This article explores the obligation of Member States, under Article 19(1) TEU, to uphold the judicial independence of all national courts who ‘may’ rule on Union law. The European Court of Justice (ECJ) first set out this obligation in their seminal ruling in Associação Sindical dos Juizes Portugueses and has since developed an extensive case-law. This article explores and discusses that case-law with the purpose of setting out, in a general manner, the key obligations Member States have under Article 19(1) TEU. Furthermore, where the ECJ has only set out general requirements without detailing their content, this article expands on the case-law by supplementing and contrasting solutions provided to similar issues in the case-law of the European Court of Human Rights (ECtHR), the recommendations of the Venice Commission and in wider International Human Rights Law. Finally, this article discusses whether judicial independence can be balanced against other aims, concerns and goals, and what room that leaves Member States to justify potential restrictions on judicial independence by the pursuit of (other) legitimate objectives.

1 INTRODUCTION AND BACKGROUND

1.1 RULE OF LAW-BACKSLIDING IN THE EUROPEAN UNION

Judicial independence has been under increasing pressure in Europe, with the so-called *Rule of law-backsliding* of several EU Member States. This has involved the deliberate capturing or weakening, by elected politicians, of internal checks on power like the judiciary, with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.¹ This has particularly been observed in Hungary under *Fidesz* and Poland under *PiS*,² but there are multiple Member States in which the confidence in the judiciary, and in their independence, are low.³

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¹ Laurent Pech and Kim Lane Scheppele, ‘Illiberalism within: Rule of Law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 3, 8 ff.; cf Damjan Kukovec, who argues that the term misrepresents what is in reality a larger ‘crisis of common values’, see Damjan Kukovec ‘The Origins of the Crisis of Common Values of the European Union’ in Tamara Čapeta, Iris Goldner Lang, and Tamara Perišin (eds), *The Changing European Union – A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) 161, 164.

² See Commission, ‘2021 Rule of law Report: The rule of law situation in the European Union’ COM (2021) 700 final, 8 ff; Commission, ‘2023 Rule of Law Report: The rule of law situation in the European Union’ COM (2023) 800 final. cf also the chapters on Hungary and Poland, see Commission, ‘2023 Rule of Law Report: Country Chapter on the rule of law situation in Hungary’ SWD (2023) 817 final; Commission, ‘2023 Rule of Law Report: Country Chapter on the rule of law situation in Poland’ SWD (2023) 821 final.

³ Commission, ‘The 2023 EU Justice Scoreboard’ COM (2023) 309, section 3.3.1, citing Ipsos European Public Affairs, ‘Flash Eurobarometer 519: Perceived independence of the national justice systems in the EU among the general public’ (2023). However, Member States still score middle to high on rule of law metrics, see the World Justice Project, ‘Rule of Law Index 2023’ (2023) <<https://worldjusticeproject.org/rule-of-law-index/>> accessed 28 March 2024.

This is an existential threat to the EU because the Union relies on decentralised enforcement of Union law by the national courts, which serve a dual role as both domestic and European courts.⁴ Lack of independence and confidence in these courts will undermine the European project and inherently challenges the values and aspirations on which it builds.

These threats led the ECJ to find, in their seminal ruling in *Associação Sindical dos Juizes Portugueses v Tribunal de Contas (ASJP)*,⁵ a general obligation under Article 19(1) TEU requiring Member States to establish and uphold independent national judiciaries. Following that ruling, the Court has developed an extensive case-law. This article will explore what obligations that case-law sets out for Member States under Article 19(1) TEU, and expand on it where possible.

1.2 ESTABLISHING AN OBLIGATION TO UPHOLD INDEPENDENCE UNDER ARTICLE 19(1) TEU

Before *ASJP*, Article 19(1) TEU largely served as a guarantee of effective remedies, mostly corresponding to what is now codified in Article 47(1) of the Charter of Fundamental Rights of the European Union (CFR). Control of whether national courts were independent was mostly a question of individual rights under the fair trial-standard, codified in Article 47(2) CFR, or as a requirement for courts wishing to refer cases to the ECJ under Article 267 TFEU.

However, these tools only gave the CJEU a rather limited ability to uphold and protect judicial independence. Article 47 CFR only applies where Member States are ‘implementing Union law’,⁶ and any requirements under Article 267 TFEU only apply to the court making a preliminary reference. In essence, these provisions gave the Court insufficient tools to address internal Member State reforms that systematically sought to undermine the judiciary.

This left the Court open to criticism for being absent, or even marginalised,⁷ in the ongoing rule of law debate. As an example, when confronted with Hungarian attempts at removing judges before the end of their terms by lowering the retirement ages, the Court had completely ignored the rule of law and independence aspects of the case and dealt with it as a matter of age discrimination.⁸

Against this backdrop, *ASJP*⁹ was the case the Court chose to address their insufficient tools to combat rule of law-backsliding. The case concerned a series of Portuguese austerity measures, which among other things reduced remuneration in the public sector, including for judges. A union of Portuguese judges, representing judges in the *Tribunal de Contas*, argued before the Portuguese Supreme Administrative Court that the reduction breached the principle of judicial independence. That court then referred the case for a preliminary ruling from the ECJ.

⁴ Koen Lenaerts, ‘New Horizons for the Rule of Law within the EU’ (2020) 21(1) German Law Journal 29, 29–30. See also Case C-204/21 *Commission v Poland (Indépendance et vie privée des juges)* EU:C:2023:442 paras 128 and 274.

⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas (ASJP)* EU:C:2018:117.

⁶ See Article 51(1) CFR.

⁷ See Matteo Bonelli and Monica Claes, ‘Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary’ (2018) 14(3) European Constitutional Law Review 622, 623.

⁸ Case C-286/12 *Commission v Hungary* EU:C:2012:687 paras 48–81.

⁹ *ASJP* (n 5).

It was not obvious that these austerity measures were ‘implementing Union law’ so that the requirement of independence in Article 47 CFR would apply. In fact, the Court had not previously dealt with austerity measures or reductions in judicial remunerations under Article 47 CFR.¹⁰ This might explain why the referring court asked about independence both under Article 47 CFR and under Article 19(1) TEU. The latter is not limited to measures ‘implementing Union law’, but states in its second subparagraph that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’, arguably giving it a wider scope of application.

In its ruling the ECJ chose to focus solely on Article 19(1) TEU,¹¹ finding that it obliged Member States to uphold the independence of all national courts that ‘may rule’ on questions of Union law,¹² which in practice includes almost all national courts. This operationalisation of Article 19(1) TEU allowed the Court to sidestep the more limited scope of Article 47 CFR and develop a broadly applicable provision with which to combat rule of law-backsliding.¹³ This has generally been seen,¹⁴ but not by everyone,¹⁵ to constitute an expansion of Union intervention in the competences of Member States to organise their own judicial systems. However, it also made sure the Court was better prepared for the next round, with tools to uphold not just an economic union, but a union of common values.

1.3 THE OBJECTIVE OF JUDICIAL INDEPENDENCE UNDER ARTICLE 19(1) TEU

This section will analyse the aim and purpose of the obligation to uphold judicial independence under Article 19(1) TEU, which is relevant for the teleological style of

¹⁰ The Court rejected a case on austerity measures in Case C-128/12 *Sindicato dos Bancários do Norte and Others* EU:C:2013:149 para 12 and Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins* EU:C:2014:2036 paras 20–21. Reductions in judges’ pensions were dealt with as a matter of property rights and equal treatment in Case C-258/14 *Florescu* EU:C:2017:448 paras 43–60.

¹¹ Contrast this with AG Saugmandsgaard Øe, who found that Article 47 CFR applied to such measures and considered the questions on that basis, see his Opinion in Case C-64/16 *ASJP* EU:C:2017:395 points 52–53 and 69–82.

¹² *ASJP* (n 5) para 40, see also Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 para 51.

¹³ Most seem to agree that this was the motivation: Laurent Pech and Sebastien Platon, ‘Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case’ (2018) 55(6) *Common Market Law Review* 1827, 1828; Bonelli and Claes (n 7) 636 ff; Charlotte Reyns, ‘Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?’ (2021) 17(1) *European Constitutional Law Review* 26, 33; Edouard Dubout, *Droit Constitutionnel de l’Union européenne* (Bruylant 2021) 198. See also Michal Ovádek, ‘Has the CJEU just Reconfigured the EU Constitutional Order?’ (*Verfassungsblog*, 28 February 2018) <<https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>> accessed 28 March 2024.

¹⁴ Bonelli and Claes (n 7) 641–643. Pech and Platon (n 13) 1827 call it ‘ground-breaking’. See also Ovádek (n 13). Konciewicz calls for Article 19(1) TEU to be rewritten to reflect its new meaning, see Tomasz Tadeusz Konciewicz, ‘The Core of the European Public Space: Revisiting Art. 19 TEU in Times of Constitutional Reckoning’ (*Verfassungsblog*, 30 June 2022) <<https://verfassungsblog.de/the-core-of-the-european-public-space/>> accessed 28 March 2024. AG Tanchev also called such an interpretation an ‘unwarranted interference in the competence of Poland’, see Opinion of AG Tanchev in Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:325 point 57; Opinion of AG Tanchev in Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:325 point 70.

¹⁵ AG Collins argues that it did not really establish anything new, see his Opinion in Case C-430/21 *RJ* EU:C:2022:44 point 68. Koen Lenaerts and José A Gutiérrez-Fons argue that anything new it did was based on common constitutional traditions of Member States, and therefore did not ‘impose’ anything on Member States, see *Les méthodes d’interprétation de la Cour de justice de l’Union européenne* (Bruylant 2020) 65–67.

interpretation usually applied by the CJEU and will help detailing the specific content and requirements in the following sections.

The text of Article 19(1) TEU first appeared, in its French wording, in the draft Constitutional Treaty during the Convention on the Future of Europe,¹⁶ and was later adopted in the final treaty.¹⁷ With the failure of that treaty, it was instead added to the TEU by the Lisbon Treaty.¹⁸ None of the *travaux préparatoires* explain the motivation for the addition, but it seems likely that it just sought to codify the principle of effective judicial protection as established in CJEU case-law.¹⁹

The purpose of that principle in case-law was originally to ensure the sufficiency of national remedies when individuals claimed a right deriving from Union law.²⁰ Recent case-law, following from *ASJP*, has clearly expanded the objective of Article 19(1) TEU, by clarifying that it is now a ‘concrete expression the value of the rule of law stated in Article 2 TEU’.²¹ In other words, the principle can be said to have an original narrower objective of ensuring sufficient remedies for individual Union rights, and a wide and newer objective of upholding shared Union values, like the rule of law.

Because the expanded application of Article 19(1) TEU in *ASJP* was justified by reading it in conjunction with the rule of law-objective in Article 2 TEU, the case-law on the obligation to uphold an independent national judiciary must therefore be read and interpreted in line with this wider objective of upholding the rule of law.²²

That said, Article 19(1) TEU must also be interpreted in conjunction with the obligation of the Union to respect national and constitutional identities in Article 4(2) TEU. The organisation of national judiciaries is still intended to be a Member State competence, with Article 19(1) TEU only providing a parameter within which Member States must exercise their competence, thus ensuring that independence and the rule of law are upheld.²³

This is further evident by the fact that the values in Article 2 and 19(1) TEU are themselves based on the common legal and constitutional traditions of Member States,²⁴ which are varied and represent different choices and priorities. Articles 2 and 19(1) TEU do not seek to standardise these variations, but represent common values Members States have

¹⁶ *Document du Praesidium : projet d'articles du titre IV de la partie I de la Constitution concernant les institutions* (23 avril 2002), draft Article 20(1) second subparagraph.

¹⁷ Treaty Establishing a Constitution for Europe, Article I-29 second subparagraph.

¹⁸ Treaty of Lisbon, amendment no. 20, Article 9 F.

¹⁹ Anthony Arnall, ‘Article 19 [The Court of Justice of the European Union]’ in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union – A Commentary* (Springer 2013) 767; Marcus Klamert and Bernhard Schima, ‘Article 19 TEU’ in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 182.

²⁰ See Matteo Bonelli, ‘Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature’ (2019) 12(2) *Review of European Administrative Law* 35, 37–40.

²¹ *ASJP* (n 5) para 32. See also Koen Lenaerts, Piet Van Nuffel, and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 79. Koen Lenaerts signalled early on that the codification in Article 19(1) TEU could be an impetus for the Court to further develop the principle, see Koen Lenaerts, ‘Rule of law and the Coherence of the Judicial System of the European Union’ (2007) 44(6) *Common Market Law Review* 1625, 1629.

²² Dubout (n 13) 197 argues that the wide interpretation given to Article 19(1) TEU had the purpose of allowing the Court to uphold the value of independence and the rule of law as enshrined in Article 2 TEU.

²³ Case C-430/21 *RS* EU:C:2022:99 para 43; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 72–74 and 263; Lenaerts, Van Nuffel and Corthaut (n 21) 755–756.

²⁴ Lenaerts and Gutiérrez-Fons (n 15) 65–67. See also *ASJP* (n 5) para 35; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* EU:C:2021:1034 para 219.

undertaken to respect, and for which they will enjoy a certain discretion on how to implement in their national constitutional systems.²⁵ Article 19(1) TEU will therefore primarily take aim at the more serious or systematic failures of the rule of law.²⁶

This also means that Article 19(1) TEU has a different and more systemic objective compared to for example independence under Article 6 ECHR and Article 47 CFR, which primarily seek to uphold judicial independence as a corollary to individual rights.²⁷ AG Bobek has argued that this difference in focus or objective means that the obligations Article 19(1) TEU imposes on Member States will more often concern the institutional and organisational aspects of judicial independence.²⁸

Lastly, Article 19(1) TEU does not just seek to ensure that the judiciary *is* independent, but also that it *seems independent*. This is often expressed in the saying that justice must be ‘seen to be done’.²⁹ The ECJ has expressed this as a consideration of whether a measure can give ‘reasonable doubt in the minds of individuals’ as to the independence of the judiciary.³⁰

2 ESTABLISHING A SEPARATE AND INDEPENDENT JUDICIAL BRANCH

2.1 GENERAL REQUIREMENTS OF SEPARATION OF POWERS

The most basic aspect of judicial independence under Article 19(1) TEU is the obligation to ensure separation of powers, specifically the judiciary as a separate branch.³¹ The organisation of the judiciary cannot be left to the discretion of other branches of power – or even judicial authorities themselves – but must be enshrined in law.³² Best-practice would likely be to

²⁵ See Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 paras 233–234; Case C-157/21 *Poland v Parliament and Council* paras 265–266; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 73.

²⁶ As argued by AG Bobek in his Opinion in Case C-132/20 *Getin Noble Bank* EU:C:2021:557 point 39.

²⁷ Koen Lenaerts distinguishes these as ‘the fundamental rights dimension’ and the ‘rule of law dimension’ of judicial independence, see Koen Lenaerts, ‘Judicial dialogue in a Changing World: Preserving Judicial Independence’ in Tamara Čapeta, Iris Goldner Lang and Tamara Perišin (eds), *The Changing European Union – A Critical View on the Role of Law and the Courts* (Hart Publishing 2022) 9, 19 and 26. The Venice Commission differentiates them as the objective and subjective components of judicial independence, see its ‘Report on the Independence of the Judicial System Part I: The Independence of Judges’ (2010) Study No. 494/2008, CDL-AD(2010)00, para 6.

²⁸ See the Opinion of AG Bobek in *Getin Noble Bank* (n 26) point 103. This is a difference in factual focus and threshold, not a difference in the definition and requirements of independence.

²⁹ A famous statement by Lord Hewart in *R v Sussex Justices, ex. p. McCarthy* [1924] 1 KB 256, 259 (Hewart J). See also the Opinion of AG Tanchev in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* EU:C:2019:551 point 120.

³⁰ Case C-132/20 *Getin Noble Bank* EU:C:2022:235 para 96. cf also the Opinion of AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *AFJR* EU:C:2020:746 point 293–295, emphasising ‘public perception’.

³¹ Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* EU:C:2019:982 para 124. Also required under the ECHR: see *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020) para 215. See also Romain Tinière and Claire Vial, *Droit de l’Union européenne des droits fondamentaux* (Bruylant 2023) 621.

³² See Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația Forumul Judecătorilor din România* (AFJR) EU:C:2021:393 paras 195–198; Case C-791/19 *Commission v Poland (Disciplinary regime of judges)* EU:C:2021:596 paras 167–168. cf UN Human Rights Committee (HRC), ‘General Comment no 32: Article 14: Right to equality before courts and tribunals and to a fair trial’ (2007) CCPR/C/GC/32, para 19.

enshrine separation of powers in the constitution.³³

Furthermore, the branches of powers must be sufficiently separated to preclude any undue influence over the judiciary.³⁴ That includes, for example, situations where the courts are subject to hierarchical constraints, subordination, or subject to the instructions of other branches.³⁵ Lastly, individual judges must be protected against undue influence over their specific decisions, even from other judges.³⁶

These requirements would likely preclude situations like the ECtHR dealt with in *Beaumartin*,³⁷ where a national court was obliged to refer certain legal questions to the executive branch for a binding answer, as that would be a type of instruction on how to decide a case. The ECtHR stated more generally that national courts had to have full independence to answer the legal question at hand, finding a breach of Article 6 ECHR in that case.³⁸

2.2 THE USE OF SPECIAL COURTS OUTSIDE THE JUDICIARY

A challenge to the doctrine of separation of powers is the use of court-like bodies that are not a part of the ordinary judiciary, either being outside of it or having relations to other branches of power. This can include bodies like customary or religious courts, administrative tribunals, military courts, courts of impeachment or even constitutional courts when established outside the judiciary. Such bodies are both a threat to separation of powers and can be used by other branches to side-line the judiciary.

The ECJ has stated, commenting on constitutional courts, that it is not decisive whether the court is a part of the ordinary judicial system, as long as it fulfils the requirements of independence.³⁹ Because constitutional courts serve a limited and very distinct purpose,⁴⁰ this statement must be seen in that context and likely does not mean that special courts outside of the judiciary are generally acceptable.

The UN Human Rights Committee (HRC) has recommended under Article 14 ICCPR that the use of military and other special courts should be exceptional and limited to situations where they serve some objective that ordinary courts are otherwise unable to undertake.⁴¹ Excessive recourse to special courts outside the ordinary judicial system would challenge the principle of separation of powers discussed above and must therefore be

³³ As recommended by the Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 22; Venice Commission, 'Rule of Law Checklist' (2013) Study No. 711/2013, CDL-AD(2016)007revm, recommendation E(1)(a)(i).

³⁴ See, on the need to avoid undue influence from other branches, inter alia, *Commission v Poland (Disciplinary regime of judges)* (n 32) para 86 and *Commission v Poland (Independence of the Supreme Court)* (n 12) para 72.

³⁵ See *RS* (n 23) para 41 and *Getin Noble Bank* (n 30) para 96.

³⁶ See for this, Case C-216/21 *AFJR II* EU:C:2023:628 paras 78–82; Opinion of AG Pikamäe in Joined Cases C-554/21, C-622/21 and C-727/21 *HLANN-INVEST* EU:C:2023:816, points 63 ff. See also *Agrokompleks v Ukraine* App no 23465/03 (ECtHR, 25 July 2013) paras 137–139. This does not preclude directives from higher courts, especially in appeal proceedings, see *Yurtayev v Ukraine* App no 11336/02 (ECtHR, 31 January 2006) para 26.

³⁷ *Beaumartin v France* App no 15287/89 (ECtHR, 24 November 1994).

³⁸ *ibid* para 38.

³⁹ *Euro Box Promotion and Others* (n 24) para 232.

⁴⁰ See, for an overview of the role of constitutional courts, Venice Commission, 'Compilation of Venice Commission Opinions, Reports and Studies on Constitutional Justice (updated)' (2020) CDL-PI(2020)004, especially section 2.

⁴¹ HRC General Comment no. 32 (n 32) paras 22–24.

similarly restricted under Article 19(1) TEU.

When Member States do use such special courts, they must necessarily also comply with requirements of independence. In case-law under Article 267 TFEU, the ECJ has found that the close links of administrative tribunals to the executive can undermine the independence of such bodies.⁴² The ECtHR has similarly found that military courts which are organised as a part of the executive and under military discipline will violate the requirement of independence in Article 6 ECHR.⁴³

2.3 OTHER ATTEMPTS AT SIDE-LINING OR INFLUENCING THE JUDICIARY

In addition to establishing courts outside of the judiciary, there are many other ways – formal and informal – by which other branches of power can seek to side-line or influence the judiciary.

The ECJ dealt with an attempt at formal side-lining in *Commission v Poland (Indépendance et vie privée des juges)*, where Poland had granted the Chamber of Extraordinary Review and Public Affairs exclusive jurisdiction on complaints regarding the independence of courts or judges. The ECJ stated that Member States in theory could grant such exclusive competence, but that it was not related to any benefit in this case, like specialisation or efficiency.⁴⁴ Rather, in the context of other reforms and the fact that even this chamber had a quite limited jurisdiction, the measure was likely meant to further weaken the effectiveness and monitoring of compliance with judicial independence, contrary to Article 19(1) TEU.⁴⁵ In *Commission v Poland (Disciplinary regime of judges)*, the Court similarly saw granting of exclusive jurisdiction to the Disciplinary Chamber of the Polish Supreme Court as one of the factors which undermined the independence of that Chamber.⁴⁶

The cases illustrate that changes in jurisdiction can threaten independence in breach of Article 19(1) TEU when clearly used to side-line the judiciary. However, in most cases Member States will have a plethora of legitimate reasons to establish new judicial bodies, change rules or enact similar measures.⁴⁷ Article 19(1) TEU will not stand in way of these as long as it is not blatant side-lining without any justifying rationale.

The use of more informal means to attempt a side-lining or undue influence in the judicial process could also undermine independence in breach of Article 19(1) TEU. As AG Bobek has opined, Article 19(1) TEU cannot simply concern itself with the law as it is ‘on the books’, but entails a requirement that these laws, institutions and protections are actually upheld in practice.⁴⁸

Some examples of such bad practices and undue influence can be found in the case-law of the ECtHR. That includes informal attempts to directly affect the outcome of

⁴² Case C-274/14 *Banco de Santander* EU:C:2020:17 paras 51–80.

⁴³ *Şahiner v Turkey* App no 29279/95 (ECtHR, 25 September 2001) paras 39–47. See also *Findlay v The United Kingdom* App no 22107/93 (ECtHR, 25 February 1997) paras 70–80.

⁴⁴ *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 264–265 and 278–279.

⁴⁵ *ibid* paras 286–289.

⁴⁶ *Commission v Poland (Disciplinary regime of judges)* (n 32) para 89. See also *A.K. and Others* (n 31) para 147.

⁴⁷ See for example the Opinion of AG Campos Sánchez-Bordona in Case C-634/22 *OT and Others (Suppression d'un Tribunal)* EU:C:2023:913 points 51–71 where the abolishment of a court, in the context of a judicial reform, did not create issues of independence.

⁴⁸ See the Opinion of AG Bobek in *Getin Noble Bank* (n 26), point 98.

a case,⁴⁹ and practices where appearances give rise to doubts regarding the independence of the court, like a sitting judge being in a hiring process – and later being appointed – for the same ministry that was a party to the case.⁵⁰

Article 19(1) TEU must likely contain similar obligations for Member State to avoid such informal interferences and practices, at least if they are of a more systematic or widespread nature that could threaten the independence of the judiciary as such.

3 JUDICIAL REMUNERATION AND THE FINANCIAL AUTONOMY OF THE JUDICIARY

Ensuring separation of powers and the establishment of an independent judiciary is not just a matter of rules and practice, but also of resources and funding. However, matters of public finance and spending priorities are closely tied to the national democratic process,⁵¹ and quite far from the core objectives of Article 19(1) TEU. This means that Member States must have a large margin for national priorities.

Financial matters related to judicial independence have been before the ECJ in two cases, *ASJP* and *Vindel*. The cases concerned, respectively, Portuguese and Spanish austerity measures which reduced the wages of public employees, including judges.⁵² The plaintiff in both cases were judges who alleged that this reduction was a threat to judicial independence, in breach of Article 19(1) TEU.

Such reductions could threaten independence under Article 19(1) TEU in two ways. Firstly, by a too low level of remuneration; and secondly, by using changes and differentiation in remuneration to reward or punish judges.

On the first issue, the absolute level of remuneration, the ECJ stated in both *ASJP* and *Vindel* that a level of remuneration which is ‘commensurate with the importance of the functions’ was an essential guarantee of independence under Article 19(1) TEU.⁵³ In *Vindel* the Court indicated that this only meant sufficient in light of the ‘socio-economic context’ and the ‘average remuneration’ of comparable employees.⁵⁴

The purpose of that requirement is to protect judges from external interference and pressure.⁵⁵ This can include, for example, the risk inherent in judges taking on dual roles to increase their remuneration, or in the worst-case resorting to corruption.⁵⁶

While both *ASJP* and *Vindel* dealt solely with the remuneration of judges, the same risks pointed out in those cases can arise with the underfunding of other parts of the judiciary. Dual roles, corruption, or in the worst-case a lack of sufficient resources for proper

⁴⁹ *Agrokompleks* (n 36) paras 123–141, specifically 133 and 134.

⁵⁰ *Sacilor Lormines v France* App no 65411/01 (ECtHR, 9 November 2006) paras 68–69.

⁵¹ Democracy is also a founding value of the EU, see Articles 2 and 10 TEU.

⁵² *ASJP* (n 5) paras 11–18 and 46–49; Case C-49/18 *Vindel* EU:C:2019:106 paras 6–12 and 67.

⁵³ *ASJP* (n 5) para 45; *Vindel* (n 52) para 66. Reiterated in Case C-216/18 PPU *LM* EU:C:2018:586 para 64. cf also Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) para 82 nr 7, and the HRC recommending ‘adequate remuneration’ in General Comment no. 32 (n 32) para 19.

⁵⁴ *Vindel* (n 52) para 70–73.

⁵⁵ *ibid.*

⁵⁶ Compare here the reasoning given by the Venice Commission for the same requirement: Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) para 46; Venice Commission, ‘Rule of Law Checklist’ (n 33) para 85. See also the reasoning by the ECtHR in *Zubko and others v Ukraine* Apps nos 3955/04, 5622/04, 8538/04 and 11418/04 (ECtHR, 26 April 2006) paras 67–69.

functioning would clearly prevent the effective judicial protection required by Article 19(1) TEU. It therefore seems likely that the obligation to provide judges with a sufficient remuneration is a concrete expression of what the Venice Commission has recommended more generally, that the judiciary must be provided with adequate resources to live up to the standards required of it.⁵⁷

On the second issue, using changes in remuneration to reward or punish judges, the ECJ emphasised in both *ASJP* and *Vindel* that the reductions were a part of general austerity measures to reduce the deficit, which were applied widely and equally.⁵⁸ They could therefore not be said to be ‘specifically adopted’ against the judges and did not threaten their independence.⁵⁹

In other words, Member States can regulate wages of judges and the judiciary on a more general level. It is, as the Venice Commission has recommended, where the changes are so specific that they can be used as ‘performance assessment’ that it will risk undermining independence.⁶⁰

That said, the best-practice solution on financial matters is likely to follow the recommendations of the HRC and Venice Commission to have clear rules and procedures for establishing remuneration⁶¹ and allow input from the judiciary in budgetary proceedings.⁶²

In total, Article 19(1) TEU can impose certain obligations on Member States when it comes to the funding of the judiciary and the administration of that funding. However, Member States will have a large room for economic priorities.⁶³ As long as remuneration is set based on transparent economic criteria, as a part of general measures not targeting specific judges, it will not threaten judicial independence.

4 ENSURING PROPER ASSIGNMENT OF CASES

Member States must ensure that the assignment of cases, both to judges and courts, is done in a manner which does not undermine the independence of those judges and courts.

The ECJ has dealt with the question of how to allocate cases in *Commission v Poland (Disciplinary regime of judges)*.⁶⁴ In that case, the president of the Disciplinary Chamber of the Polish Supreme Court, which had jurisdiction as an appellate court in disciplinary cases, had full discretion to decide which court had jurisdiction in the first instance without needing to base that decision on pre-existing criteria. The ECJ stated that such a system could be used to put pressure on judges by directing cases to certain judges while avoiding others.⁶⁵ Such

⁵⁷ Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) paras 52–55; Venice Commission, ‘Rule of Law Checklist’ (n 33) recommendation E(1)(a)(x).

⁵⁸ *ASJP* (n 5) paras 46–48; *Vindel* (n 52) para 67.

⁵⁹ *ASJP* (n 5) paras 49 and 51.

⁶⁰ See Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) para 46, where it recommends avoiding discretion or individual assessments.

⁶¹ HRC General Comment no. 32 (n 32) para 19; Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) para 46.

⁶² Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) para 55; Venice Commission, ‘Rule of Law Checklist’ (n 33) recommendation E(1)(a)(x).

⁶³ Especially in an economic crisis. See the Opinion of AG Saugmandsgaard Øe in *ASJP* (n 11) point 82.

⁶⁴ *Commission v Poland (Disciplinary regime of judges)* (n 32).

⁶⁵ *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 164–177.

discretion in assigning jurisdiction did not meet the requirements of Article 19(1) TEU.

The case can be said to establish the principle that jurisdiction must be determined by objective criteria set in advance.⁶⁶ The facts of the case only dealt with establishing jurisdiction for courts, but assigning jurisdiction to individual judges within courts raises similar concerns and issues. Discretion in such matters can be used to direct cases to certain judges for a preferred outcome, or to influence judges by overburdening some while rewarding others with high profile cases.⁶⁷ It is therefore likely that the statements in *Commission v Poland (Disciplinary regime of judges)* are an expression of a more general obligation to ensure that jurisdiction is based on objective criteria set in advance both for courts and judges.

Such an interpretation of Article 19(1) TEU would align well with the case-law of the ECtHR and the recommendations of the Venice Commission. Both require that the assignment of jurisdiction, to courts and to individual judges, must be determined by objective criteria set in advance.⁶⁸

However, the requirement of jurisdiction being determined in advance does not mean that there is no room for flexibility. The Venice Commission takes no issue with cases being assigned to judges with specific competencies, or rules that consider the workload of judges.⁶⁹ Furthermore, rules that allow for the reassignment of cases in certain situations must also be permissible, like when the assigned judge falls ill. Problems arise where the rules are so flexible as to *de facto* allow for discretion in assigning jurisdiction, thereby allowing it to be used to reward or punish judges.

5 ENSURING PROPER APPOINTMENT OF JUDGES

5.1 GENERAL REQUIREMENTS FOR APPOINTMENT PROCEDURES

The appointment of judges⁷⁰ is an important avenue through which the judiciary can be influenced. That could involve everything from appointing judges with favourable viewpoints to packing the court with judges that are seen as more loyal.

For this reason, the ECJ has stated repeatedly that Article 19(1) TEU obliges Member States to have rules on appointment that can dispel any reasonable doubt as to the independence of a judge and their neutrality with respect to interests before them once appointed.⁷¹ This must be ensured during the whole process of appointments, which includes

⁶⁶ See further on this principle, Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) section 11.

⁶⁷ cf the reasoning on discretionary transfer of judges in Case C-487/19 *W.Ż.* EU:C:2021:798 para 115.

⁶⁸ Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 73–81; Venice Commission, 'Rule of Law Checklist' (n 33) 22 recommendation IV. See also *Miracle Europe KFT v Hungary* App no 57774/13 (ECtHR, 12 January 2016) paras 57–67.

⁶⁹ Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) para 80.

⁷⁰ Including transfers, secondments, reassignments and promotions. On promotions, see *AFJR II* (n 36) paras 65–67 and 71.

⁷¹ See, inter alia, Joined Cases C-542/18 RX-II and C-543/18 RX-II *Simpson and HG* EU:C:2020:232 para 71; *Getin Noble Bank* (n 30) para 95. See from IHRL: HRC General Comment no. 32 (n 32) para 19; *Quintana Coello et al. v. Ecuador*, IACtHR, judgment of 23rd August 2013, Series C No. 266 para 144. See also Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 25–38.

the criteria used to evaluate appointees,⁷² the procedural rules governing appointments,⁷³ and any potential irregularities during appointments.⁷⁴ These parts of the appointment procedure will be considered in turn.

5.2 THE CRITERIA USED TO SELECT APPOINTEES

The substantive criteria for selecting candidates is an important starting point for ensuring judicial independence. Article 19(1) TEU requires that the substantive conditions are known in advance,⁷⁵ and drafted in such a way as to not give rise to reasonable doubt as to the independence of the appointee.⁷⁶

The primary criterion for appointments should be merit. This is clear from the ruling in *AFJR II*, where an evaluation of the work and conduct of a candidate based on randomly selected previous cases, records of previous hearings and their professional file were criteria the ECJ found to be ‘relevant for the purpose of assessing the professional merits of candidates’.⁷⁷

The case-law of the ECtHR has also emphasised merit-based selection as ‘paramount’ to ensuring the technical function and public confidence in the judicial system.⁷⁸ By ‘merit’, the ECtHR refers to both technical competence and moral integrity. The Venice Commission has similarly recommended that merit be the primary criteria for evaluating candidates because it ensures transparency and creates public trust.⁷⁹

In other words, Member States must ensure that merit is the primary criterion. However, neither of these courts require it to be the only criterion, leading to the question of what margin Member States have to allow political considerations in appointments.

In *AFJR II*, the ECJ emphasised the importance of an ‘objective assessment based on verifiable information’, to avoid a discriminatory procedure.⁸⁰ At the same time, the ECJ has not inherently condemned appointments by the legislative or executive branches,⁸¹ and neither has the ECtHR.⁸² The acceptance of the involvement of other branches can be seen as a tacit acceptance of at least some political discretion in appointments, at minimum regarding the judicial philosophy or interpretive practices of the potential appointee.

Such a tacit acceptance is also supported by the fact that even blatant political motivations in appointments are somewhat common among Member States, at least for

⁷² *W.Ż.* (n 67) para 148; *Getin Noble Bank* (n 30) para 97.

⁷³ *ibid.*

⁷⁴ *Simpson and HG* (n 71) para 75 and *W.Ż.* (n 67) para 130.

⁷⁵ *cf* for secondments, Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa* EU:C:2021:931 paras 78–79.

⁷⁶ Case C-896/19 *Repubblika* EU:C:2021:311 paras 55 and 57.

⁷⁷ *AFJR II* (n 36) paras 83–85. The details of the criteria are better explained in the Opinion of AG Emiliou in Case C-216/21 *AFJR II* EU:C:2023:116 points 72–73.

⁷⁸ *Ástráðsson* (n 31) paras 220–222; *Advance Pharma sp. z o.o. v Poland* App no 1469/20 (EctHR, 3 February 2022) para 295.

⁷⁹ Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) paras 25–27; Venice Commission, ‘Rule of Law Checklist’ (n 33) recommendation VI and para 79.

⁸⁰ *AFJR II* (n 36) paras 85–86.

⁸¹ Case C-824/18 *A.B. and Others* EU:C:2020:1053 para 122; *Repubblika* (n 76) para 56.

⁸² See *Absandze v Georgia* App no 57861/00 (ECtHR, 15 October 2002) section F (a); *Makouf and Damjanović v Bosnia and Herzegovina* Apps nos 2312/08 and 34179/08 (ECtHR, 18 July 2013) para 49; *Thiam v France* App no 80018/12 (ECtHR, 18 October 2018) para 59; *Xero Flor w Polsce sp. z o.o. v Poland* App no 4907/18 (ECtHR, 7 May 2021) para 252.

constitutional courts.⁸³ Because Article 2 and 19(1) TEU build on the common constitutional traditions of Member States,⁸⁴ it seems unlikely that this would be entirely precluded. AG Hogan stated this clearly in *Repubblika*, arguing that it was ‘pointless to deny that politics has played a role – sometimes even a decisive one – in the appointment of judges in many legal systems, including those in many Member States’.⁸⁵ He points out that these courts have still remained resolutely independent.

The objective of judicial independence under Article 19(1) TEU also seems to support such a view. It seeks to uphold effective judicial protection and the rule of law, which requires an independent judiciary but also a system of checks and balances. Some executive and legislative involvement in appointments can act as a ‘check’, ensuring democratic legitimacy and institutional balance for important matters like constitutional interpretation and review.⁸⁶ Furthermore, judges tend to not be very representative of wider society. Involvement of the other branches can therefore help ensure representativeness and outside input, avoiding an inward looking or technocratic judiciary.

That said, the room for political considerations or discretion for Member States cannot be very large. Firstly, if merit must be the primary criterion, political considerations are only acceptable as a secondary criterion where candidates are of roughly equal merit. Secondly, the ECJ has clearly disapproved of appointments where political discretion was decisive in the procedure.⁸⁷

One way Member States try to balance the concern for judicial independence with the need for democratic legitimacy and checks on judicial power is by limiting political discretion in appointments to a constitutional court only.⁸⁸ The power of such courts to set aside, or limit, laws made by an elected parliament can put them at risk of lacking democratic legitimacy, or entail a higher risk of misuse. Involvement from the other branches in appointments can act as a check, and can help ensure a representative and balanced composition of the court. As constitutional courts don’t decide the outcome of individual cases, some political involvement is arguably less problematic.

For Member States without a constitutional court, they must likely have some room to ensure similar checks at least over their supreme courts. However, these are courts that decide on individual cases, often with the state as a party. Too much political discretion in appointments could create doubt as to the outcomes of those cases. It therefore seems likely that the room for political discretion in appointments is smaller than what can be accepted

⁸³ See for an overview, CJEU, Direction de la recherche et documentation, ‘Note de Recherche – Procédures de nomination et de désignation des juges dans les États membres et rôle exercé par le pouvoir exécutif ou législatif dans le cadre de ces procédures’ (October 2020) paras 53–74 and the relevant country chapters. See also Venice Commission, ‘The Composition of Constitutional Courts, Science and technique of democracy, No. 20’ CDL-STD(1997)020, section 1; Venice Commission, ‘Compilation of Venice Commission Opinions’ (n 40) section 4.

⁸⁴ *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 69 and 73.

⁸⁵ See the Opinion of AG Hogan in Case C-896/19 *Repubblika* EU:C:2020:1055 point 57.

⁸⁶ In *Land Hessen* it was acceptable under Article 267 TFEU that a majority of members in a judicial council were appointed by the legislative for reasons of democratic legitimacy. See Case C-272/19 *Land Hessen* EU:C:2020:535 paras 53–58. However, when combined with other issues the result could be different. See *Commission v Poland (Disciplinary regime of judges)* (n 32) para 103. See also the discussion in CCJE Opinion No. 18 ‘The position of the judiciary and its relation with the other powers of state in a modern democracy’ (2015) para 15.

⁸⁷ See *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 88–112; *W.Ż.* (n 67) paras 129–130.

⁸⁸ See above n 83.

for a constitutional court.

5.3 THE PROCESS FOR APPOINTMENTS

The process for appointments is central both to ensuring that the criteria discussed above are actually followed, and to ensure that there are no undue influences in the procedure.

There are a multitude of processes for appointing judges throughout the Member States of the European Union,⁸⁹ and Article 19(1) TEU does not impose an obligation to adopt a specific procedure of appointments. It only requires that the procedure does not leave room for reasonable doubt as to the independence of the appointee.⁹⁰ That further requires that the procedure must be laid down in advance and that statements of reason are given, to ensure transparency and objectivity.⁹¹ This section will consider how different systems of appointments align with these requirements.

The first system to be considered is appointment of judges by way of direct election. This is a rare system of appointment in Europe,⁹² and has not been the subject of a case before the ECJ. The Venice Commission has stated that such systems provide democratic legitimacy but could also risk drawing judges into electoral politics, politicising the process.⁹³ It could create doubt as to the independence of judges if they reside over cases on policies they expressed support or opposition to in their electoral platforms.

A further problem with direct elections is that it would seem to conflict with the requirement, discussed above, that merit should be the primary criteria for appointments. However, as stated, merit has two sides: technical competence and moral integrity. Technical competence could be ensured in direct elections by requirements for legal competence to be eligible to run, while moral integrity seems like something an electorate might be well suited to consider. An advantage of direct elections would be that they, by nature, leave less room for the political preferences, or undue influence, of the other branches.

In total, direct elections are an unusual model with clear advantages and disadvantages. The answer would likely be that it is a matter which remains within the discretion of Member States and their capacity to choose their own constitutional systems. However, Article 19(1) TEU could oblige Member States to secure certain minimum standards and safeguards, like requiring minimum levels of legal competence to run.

The second system to be considered is the appointment of judges by the executive branch, typically direct appointments by the head of state or a minister. It is a common way of appointment,⁹⁴ and the ECJ has clarified in many cases that executive influence in appointments is acceptable, as long as the appointee remains independent once appointed.⁹⁵ An example is found in *Repubblika*, where appointments by the Maltese president, in

⁸⁹ For an overview, see Venice Commission, 'Judicial Appointments Opinion No. 403/2006' CDL-AD(2007)028; CJEU, Direction de la recherche et documentation (n 83).

⁹⁰ See, inter alia, *Simpson and HG* (n 71) para 71.

⁹¹ See *Prokuratura Rejonowa* (n 75) paras 78–79.

⁹² Venice Commission, 'Judicial Appointments' (n 89) para 9 gives elections at the Swiss canton level as the sole example.

⁹³ *ibid.*

⁹⁴ Venice Commission, 'Judicial Appointments' (n 89) para 13 ff; CJEU, Direction de la recherche et documentation (n 83).

⁹⁵ *Repubblika* (n 76) para 56; *Euro Box Promotion and Others* (n 24) para 233. See also from the ECtHR: *Ástráðsson* (n 31) para 207; *Xero Flor* (n 82) para 252.

combination with the prime minister, did not undermine independence because their discretion was sufficiently limited. Firstly, discretion was limited by requirements in law establishing minimum requirements for the competence of any appointee.⁹⁶ Secondly, discretion was limited by candidates being recommended by a judicial council.⁹⁷ The prime minister could diverge from these recommendations, but had to state reasons for any such divergence, which meant it was only done sparingly.⁹⁸

The case indicates that, on the one hand, Article 19(1) TEU does not preclude direct appointments of judges by the executive as long it is based on objective requirements and merit-based evaluation. On the other hand, Article 19(1) TEU would preclude such appointments where the executive is left too much discretion. That was the case for the Polish Disciplinary Chamber, where all judges were newly appointed by the president and the judicial council was not sufficiently independent to limit presidential discretion.⁹⁹

Constitutional courts are a special case where Member States have more leeway in how they appoint judges. In *Euro Box Promotion and Others* the ECJ accepted appointments to the Constitutional Court of Romania made by the executive and legislative. There were legal requirements aimed at securing a high level of merit, and guarantees of independence once appointed, but no judicial council or similar safeguard against political discretion.¹⁰⁰

In total, direct appointments by the executive are acceptable under Article 19(1) TEU where it can be ensured that merit is the primary criteria for appointments and that executive discretion is sufficiently limited, for example by a judicial council.¹⁰¹

The last system to be considered is election of judges by the parliament. Such elections have some of the same benefits in ensuring democratic legitimacy as direct elections, but also carry similar risks of undue influence and the dominance of political motivations as elections by the executive branch. The nature of parliamentary votes, and the political games in the parliament, might even increase the risk of politicisation. The Venice Commission recommends that parliamentary votes are unsuited for appointing judges of regular courts.¹⁰²

However, the ECJ has, in its case-law, not distinguished between the involvement of the legislative and executive branches in appointments. It has stated, for both branches, that it is a question of ensuring that the appointee is not subordinated and remains independent once appointed.¹⁰³

That means that the discussion above about appointments by the executive will apply equally to elections by the legislative or other procedures whereby the legislature has influence on the appointment proceedings. Elections by the legislature would then be

⁹⁶ *Repubblika* (n 76) para 70.

⁹⁷ *ibid* para 66, cf para 5.

⁹⁸ *ibid* para 71.

⁹⁹ *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 88–112. The Chamber was new and composed exclusively of newly appointed judges appointed by a procedure dominated by the executive.

¹⁰⁰ *Euro Box Promotion and Others* (n 24) paras 233–235 and para 18.

¹⁰¹ See, on the use and requirements of such councils, section 8 below. A judicial assessment board could fulfill a similar role, see *AFJR II* (n 36) para 75. A strong legal culture can also constrain discretion, see *Ástráðsson* (n 31) para 230; Venice Commission, ‘Judicial Appointments’ (n 89) para 5; Venice Commission, ‘Rule of Law Checklist’ (n 33) para 82.

¹⁰² Venice Commission, ‘Judicial Appointments’ (n 89) paras 10–12.

¹⁰³ See *Commission v Poland (Independence of the Supreme Court)* (n 12) para 116; *Repubblika* (n 76) paras 53–56; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 103; Opinion of AG Rantos in Case C-718/21 *Krajowa Rada Sądowictwa (Maintien en fonctions d’un juge)* EU:C:2023:150 points 28 and 67–68. See from the ECtHR: *Ástráðsson* (n 31) para 207; *Xero Flor* (n 82) para 252.

acceptable where sufficiently constrained by legal requirements and limitations on their discretion, like requiring that a judicial council recommends candidates. Member States likely have more leeway with elections to constitutional courts, possibly also to supreme courts.

5.4 IRREGULARITIES DURING APPOINTMENTS

In addition to ensuring that the law provides for legitimate criteria and a sufficient process, Member States must ensure that these requirements are upheld and followed in practice. Irregularities during appointments can range from procedural errors to outright interference or side-lining of the rules. This section seeks to analyse when irregularities are such as to threaten independence under Article 19(1) TEU.

As a starting point, minor irregularities during an appointment procedure will not affect the independence of the appointee.¹⁰⁴ As the ECJ has stated, it is only those irregularities which ‘create a real risk that other branches of the State [...] could exercise undue influence’ that will undermine independence, which is the case when the irregularities have disregarded ‘fundamental rules’ in the appointment procedure.¹⁰⁵

The ECJ has dealt with several cases on irregularities. In *Simpson and HG*,¹⁰⁶ the ECJ considered an irregularity in the appointment to the European Civil Service Tribunal, where it had issued a public call to fill two empty seats and made a list of the applicants, from which it also had drawn candidates to fill a later third seat. The Court found this to technically be an irregularity, as it violated the original public call.¹⁰⁷ However, it did not violate the court statute or any EU law and was not of such a gravity as to indicate any unjust use of power.¹⁰⁸ In other words, purely technical irregularities will not undermine the independence of an appointee.

The Court dealt with two irregular appointments in *Getin Noble Bank*.¹⁰⁹ The first judge had originally been appointed during the Polish Peoples Republic (PPR), an undemocratic regime, and reappointed on the recommendation of a judicial council which was not transparent and whose decisions could not be challenged.¹¹⁰ The second judge had been appointed, years ago, on the recommendation of a judicial council whose member used rules on tenure that were later declared unconstitutional, retroactively making their composition irregular.¹¹¹

The Court found that neither of these irregularities were a threat to independence. The ECJ saw no reason why being originally appointed under the PPR would in any way enable any undue influence over that judge today.¹¹² The Court stated similarly that no reasons had been presented as for why neither insufficient transparency and lack of an ability to challenge decisions, nor unconstitutional rules for tenure on judicial councils, were irregularities that

¹⁰⁴ *Getin Noble Bank* (n 30) para 123.

¹⁰⁵ *Simpson and HG* (n 71) para 75; *W.Ż.* (n 67) para 130; *Getin Noble Bank* (n 30) para 122. Taken from the test developed in *Astráðsson* (n 31) paras 244–247.

¹⁰⁶ *Simpson and HG* (n 71).

¹⁰⁷ *ibid* para 68. On the basis of Article 47 CFR.

¹⁰⁸ *ibid* paras 79–82.

¹⁰⁹ *Getin Noble Bank* (n 30).

¹¹⁰ *ibid* paras 80, 101–103 and 111.

¹¹¹ *ibid* para 110.

¹¹² *ibid* paras 105–107.

would give rise to reasonable doubt about the independence of these judges today.¹¹³

In other words, even if an appointment procedure or irregularity possibly could have violated Article 19(1) TEU today, the best approach if the irregularity is old can be to apply a *laissez faire* approach unless it allows undue influence over judges in existing and future cases. In fact, this approach might be necessary to protect independence, by precluding the executive from using old irregularities as a means of pressuring judges.¹¹⁴

A case where the irregularities were grave enough to undermine the independence of the appointee was *W.Ż.*¹¹⁵ The judge in question had been recommended by the Polish National Council of the Judiciary, but that recommendation had been suspended by the Supreme Administrative Court on appeal, pending a referral before the ECJ.¹¹⁶ The Polish president disregarded this suspension and proceeded to appoint the judge in question to the Chamber of Extraordinary Control and Public Affairs of the Supreme Court. In the view of the ECJ, this irregularity had violated ‘fundamental rules’ in the appointment procedure.¹¹⁷

Contrasting the results in *W.Ż.* with those in *Getin Noble Bank* and *Simpson and HG*, the Court seems to take a functional approach, focusing on whether the irregularity gives the current executive or legislative undue influence over the judiciary. The president disregarding established procedure to push through his appointee in *W.Ż.* created such a risk of undue influence, whereas in *Getin Noble Bank* and *Simpson and HG*, the irregularities were, respectively, old and of a technical nature.

ECtHR case-law similarly indicates that it is only where irregularities are grave enough to increase the discretion of the executive or legislative over appointments that they will be seen to undermine independence. This was the case in *Astráðsson*, where the Icelandic minister of justice failed to both state reasons and have individual votes in Parliament on changes to the proposed ranking of applicants to the appellate court. The ECtHR saw that as a breach of ‘fundamental rules’ in that procedure.¹¹⁸ Similarly, ‘fundamental rules’ were breached in *Xero Flor* because the Polish president had refused to take the oaths of lawfully appointed judges, instead delaying until the next parliamentary session so that the new majority could appoint judges.¹¹⁹

In conclusion, the irregularities that cause a breach of Article 19(1) TEU are those which grant other branches increased discretion to appoint their own preferred judges. This will typically not be the case for minor or technical irregularities. Older irregularities will have to be examined on the basis of whether they still give rise to a risk of reasonable doubt towards, or undue influence over, the judges in question.

¹¹³ *Getin Noble Bank* (n 30) paras 125–131.

¹¹⁴ This was largely what seems to be the reality behind the reference in *Getin Noble Bank*. See Pawel Filipek, ‘Drifting Case-law on Judicial Independence: A Double Standard as to What Is a ‘Court’ Under EU Law?’ (CJEU Ruling in C-132/20 *Getin Noble Bank*)? (*Verfassungsblog*, 13 May 2022) <<https://verfassungsblog.de/drifting-case-law-on-judicial-independence/>> accessed 28 March 2024.

¹¹⁵ *W.Ż.* (n 67).

¹¹⁶ This pending case was *A.B. and Others* (n 81).

¹¹⁷ *W.Ż.* (n 67) paras 134–152.

¹¹⁸ *Astráðsson* (n 31).

¹¹⁹ *Xero Flor* (n 82).

6 ENSURING SUFFICIENT TENURE AND IRREMOVABILITY OF JUDGES

6.1 LENGTH OF TENURE AND USE OF TEMPORARY APPOINTMENTS

For judges to be able to judge independently, their position must be secure regardless of the result of their rulings. It is a generally accepted standard of independence that judges must have security of tenure either until mandatory retirement age or the expiry of their term in office, both in EU law¹²⁰ and in general IHRL.¹²¹ However, this standard raises some problems. Firstly, how long must terms of office be. If they are too short, they do not offer much security. Secondly, how does the use of probationary or provisional appointments of judges stack up against this standard.

On the first problem, the duration of terms, there is no minimum term length in EU case-law, but the ECJ has stated generally that the length of service is a relevant factor in considering the independence of a judge or court.¹²² The Court did touch upon the issue of short appointments in *Commission v Poland (Independence of the Supreme Court)*.¹²³ In that case, the Polish president could extend the duration of Supreme Court judges' terms beyond the age of retirement by three years, up to two times. The Court found such an arrangement to undermine independence in violation of Article 19(1) TEU. This conclusion was primarily motivated by the large discretion the Polish president had in deciding extensions, but could still indicate that three-year terms are on the shorter end.¹²⁴

The ECtHR has dealt more extensively with term lengths and has accepted rather short terms. A 3-year long renewable term was accepted in *Sramek*, as well as the possibility of even shorter terms if a judge was appointed in the middle of a term.¹²⁵ Similarly, a 2-year renewable term was accepted by the grand chamber in *Maktouf and Damjanović*.¹²⁶ That case concerned an internationally seconded judge in a temporary war crimes chamber, so the Court found the short terms 'understandable given the provisional nature of the international presence at the State Court and the mechanics of international secondments'.¹²⁷ In *Sigfirdingur* the ECtHR stated more generally that a 'rather short' term 'cannot [...], by itself affect their

¹²⁰ *Commission v Poland (Independence of the Supreme Court)* (n 12) para 76; Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:924 para 113; Opinion of AG Tanchev in *Commission v Poland (Independence of the ordinary courts)* (n 14) point 104.

¹²¹ See HRC General Comment no. 32 (n 32) para 19; *Quintana Coello* (n 71) para 145; *Zamora v. Venezuela* Comm. No. 2203/2012, CCPR/C/121/D/2203/2012 para 9.3; *Ástráðsson* (n 31) para 239. See also Venice Commission, 'Report on the Independence of the Judicial System Part I' (n 27) paras 33–35; Venice Commission, 'Rule of Law Checklist' (n 33) para 76.

¹²² *Commission v Poland (Independence of the Supreme Court)* (n 12) para 74; *Commission v Poland (Independence of the ordinary courts)* (n 120) para 66.

¹²³ *Commission v Poland (Independence of the Supreme Court)* (n 12).

¹²⁴ *Ibid* para 98 ff.

¹²⁵ *Sramek v Austria* App no 8790/79 (EctHR, 22 October 1984), paras 26 and 38. cf the 3-year terms for unpaid appointees in *Campbell and Fell v The United Kingdom* Apps nos 7819/77 and 7878/77 (EctHR, 28 June 1984) para 80.

¹²⁶ *Maktouf and Damjanović* (n 82).

¹²⁷ *Ibid* para 51.

independence'.¹²⁸

In other words, the term duration itself is rarely decisive in ECtHR case-law on independence. However, while not decisive in itself, the ECtHR has seen short terms as one of the factors that undermine independence. In *Incal*, the ECtHR found that a term which 'is only four years and can be renewed' was one of the factors which lead it to conclude that the court in question lacked independence.¹²⁹

To summarise, the ECtHR takes a very flexible approach. A two-year term was acceptable in *Maktof and Damjanović* where it served a useful purpose and created no obvious issues, whereas in *Incal* a four-year term was seen as one factor among several, which in total undermined independence.

Such an approach seems useful and should likely be adopted by the ECJ as well. The acceptability of short terms under Article 19(1) TEU could be considered on a case-by-case basis, taking into account their duration, whether they are justified by some legitimate aim, and the context of whether the short terms compound with other issues which, in total, undermine independence.

*On the second problem, the use of provisional appointments,*¹³⁰ provisional appointments are by their nature at odds with judicial independence and their use is an exception to the general rule that judges be employed on tenure. A temporary job where continuing employment might depend on how a third party evaluates their work leaves a lot of room for undue pressure.

The ECJ has dealt with several types of provisional appointments, and as a general rule it is problematic where it gives the executive a lot of sway over the employment of a judge. The case mentioned above, *Commission v Poland (Independence of the Supreme Court)*, where the ECJ disapproved of a Polish system whereby a judge's term could be extended two three-year periods after their ordinary retirement age on the discretion of the president, is illustrative in that regard.

The benefits and problems of provisional appointments were most clearly dealt with in *Prokuratura Rejonowa*.¹³¹ The case concerned a system for the secondment of judges where the minister could second a judge for a fixed or indefinite period and could terminate it at any time.¹³² The ECJ stated that temporary secondments were permissible 'in the interests of the service',¹³³ but that several features of this system undermined the independence of the seconded judge, including the discretionary power of the minister to terminate the secondment.¹³⁴ In other words, secondments are acceptable when they are useful for the judicial service, but must be accompanied by sufficient guarantees to protect the temporary judge against undue influence.

This reasoning could be applied to other provisional appointments as well. For example, temporary appointments can help cover temporary caseloads and ensure resource efficiency, and probationary periods (trial periods) can be useful to ensure the competency

¹²⁸ *Sigfirðingur Ebf v Iceland* App no 34142/96 (EctHR, 7 September 1999).

¹²⁹ *Incal v Turkey* case no 41/1997/825/1031 (EctHR, 9 June 1998) para 68. See also *Çıraklar v Turkey* case no 70/1997/854/1061 (EctHR, 28 October 1998) para 39.

¹³⁰ Meaning all appointments of a temporary nature or which can be terminated at discretion.

¹³¹ *Prokuratura Rejonowa* (n 75).

¹³² *Ibid* paras 9 and 80.

¹³³ *Ibid* para 72.

¹³⁴ *Ibid* paras 77–87, especially 80–83.

of an appointee. However, both of these also create similar risks of undue influence and must be accompanied by safeguards. The HRC has recommended more generally that all provisional appointments must have ‘appropriate guarantees’ and be ‘exceptional and limited in time’.¹³⁵

In conclusion, therefore, it seems that provisional appointments are acceptable under Article 19(1) TEU as long as there are sufficient guarantees and their use is exceptional and limited to what is necessary in the interests of the service.

6.2 IRREMOVABILITY OF JUDGES DURING TENURE

Ensuring tenure for judges must necessarily mean that they cannot, ordinarily, be removed before the expiration of their term. This is often called the principle of irremovability, and is widely acknowledged by the ECJ,¹³⁶ the ECtHR,¹³⁷ and in wider IHRL.¹³⁸ If judges could be removed before the expiration of their terms, the executive or legislative could pressure judges for favourable outcomes or seek to remove disloyal judges.

This section will take a closer look at, firstly, what constitutes a ‘removal’ of a judge, and secondly, in which situations Member States legitimately can remove judges.

Firstly, on what constitutes a ‘removal’ of a judge. The ECJ has clarified that the principle of irremovability applies to more than just removal in a strict sense. In *W.Ż.* the Court stated that the principle also applies to the transfer of a judge to another position.¹³⁹ In *Commission v Poland (Independence of the Supreme Court)* and *Commission v Poland (Independence of the ordinary courts)* the Court clarified that more indirect ways of removal are also covered, like being prematurely removed by lowering their retirement age.¹⁴⁰

The scope of the principle of irremovability must therefore be interpreted broadly and will likely apply to any measure which has the consequence of changing the position of a judge, without their consent, before the expiration of their term as it was originally set.

Secondly, on when removal is permitted. The ECJ has stated as a general rule that no exceptions from irremovability are allowed unless justified by ‘legitimate and compelling grounds, subject to the principle of proportionality’.¹⁴¹ Situations where it could clearly be justified includes where a judge is deemed unfit for carrying out their duties, or due to serious breaches of their obligations, provided that appropriate procedures are followed.¹⁴² Member States can also transfer judges to positions of equal rank when they reorganise their judicial systems, given sufficient safeguards.¹⁴³

¹³⁵ *Zamora v. Venezuela* (n 121) para 9.3.

¹³⁶ See, inter alia, *Commission v Poland (Independence of the Supreme Court)* (n 12) para 76; *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 113 and 125.

¹³⁷ *Astráðsson* (n 31) para 239.

¹³⁸ HRC General Comment no. 32 (n 32) para 19; Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) para 43; *Quintana Coello* (n 71) para 145.

¹³⁹ *W.Ż.* (n 67) paras 114–115. See also the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d’un Tribunal)* (n 47) points 72 ff.

¹⁴⁰ *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 75–96; *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 115–130.

¹⁴¹ *Commission v Poland (Independence of the Supreme Court)* (n 12) para 76; *Commission v Poland (Independence of the ordinary courts)* (n 120) para 113. See further on justification in section 10.

¹⁴² *Commission v Poland (Independence of the ordinary courts)* (n 120) para 113; *W.Ż.* (n 67) para 112.

¹⁴³ See the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d’un Tribunal)* (n 47) points 72–80.

An example where the removals were not justified is found in *Commission v Poland (Independence of the Supreme Court)*.¹⁴⁴ The alleged objectives of standardising the retirement age applicable to all workers and improving the age balance among senior members of the Supreme Court,¹⁴⁵ could not justify lowering retirement ages and early termination of the judges' tenure.¹⁴⁶

Furthermore, if any early removal of a judge is to be proportionate, it must be accompanied by sufficient safeguards. The ECJ has required the same safeguards for the early removal of judges as it has for the imposition of disciplinary sanctions.¹⁴⁷ This makes sense, disciplinary sanctions are one of the ways in which judges could be removed before the expiration of their term. Which safeguards removals of judges requires will therefore be discussed in the following section dealing with disciplinary regimes.

7 LIMITING AND SAFEGUARDING DISCIPLINARY REGIMES

Upholding the rule of law can necessitate checks and balances even on the judiciary, to combat misuse of power. One often-used check is the establishment of disciplinary regimes for judges. On the one hand, a well-functioning disciplinary regime can help guarantee the proper conduct and impartiality of judges. On the other hand, investigating and sanctioning judges for job-related conduct can easily be misused as a means to pressure judges and courts.

The ECJ has stated that it is up to the Member States whether they want to employ disciplinary regimes to ensure the accountability and effectiveness of the judicial system.¹⁴⁸ However, any use of such a system, or similar systems of sanctioning in other areas of law,¹⁴⁹ must fulfil certain requirements. Firstly, liability must be limited to 'entirely exceptional' cases arising from requirements relating to the sound administration of justice,¹⁵⁰ and secondly, there must be sufficient safeguards to avoid political abuse.¹⁵¹ These two requirements will be discussed in turn.

The first requirement, namely, the requirement of being limited to 'entirely exceptional' cases, applies to all sides of the potential liability. Examples of an exceptional situation could be violations of law done 'deliberately and in bad faith' or as a result of 'serious and gross negligence', or exercise of duties in a manner which is 'arbitrary' or 'denies justice'.¹⁵²

In some cases, the ECJ has essentially found that judges were held liable for actions which by their nature were not 'entirely exceptions' situations justifying liability. In *IS* and the fifth complaint in *Commission v Poland (Disciplinary regime of judges)*, judges in Hungary and Poland, respectively, could be held liable for making references to the ECJ under

¹⁴⁴ *Commission v Poland (Independence of the Supreme Court)* (n 12).

¹⁴⁵ *ibid* para 81.

¹⁴⁶ *ibid* paras 82–97.

¹⁴⁷ *ibid* para 77; *Commission v Poland (Independence of the ordinary courts)* (n 120) para 114.

¹⁴⁸ *AFJR* (n 32) para 229; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 136.

¹⁴⁹ See *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 96–100, which states that the same principles must apply to liability in other areas, like criminal law or labour law.

¹⁵⁰ *Commission v Poland (Disciplinary regime of judges)* (n 32) para 139; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 127.

¹⁵¹ *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 136 and 138.

¹⁵² *ibid* para 137; *Euro Box: Promotion and Others* (n 24) para 238. cf also Venice Commission, 'Republic of Moldova – Amicus Curiae Brief for the Constitutional Court – On the Right of Recourse by the State Against Judges' (2016) Opinion No. 847/2016, CDL-AD (2016)015 paras 69, 75 and 77–80.

Article 267 TFEU. The Court stated that such liability was a threat to independence.¹⁵³

In *Euro Box Promotion and Others* and *RS*,¹⁵⁴ judges in Romania could be held liable for failing to comply with a judgment of the Constitutional Court in their adjudication, even where the judges held that the Constitutional Court had misinterpreted, for example, EU law. The ECJ stated that Article 19(1) TEU did not inherently preclude liability as a result of judicial decisions adopted by judges, but that the liability was clearly not limited to ‘entirely exceptional’ circumstances in this case. Article 19(1) TEU would therefore preclude national rules under which any failure to comply with the decisions of a constitutional court could trigger liability.¹⁵⁵

In other cases, the ECJ has focused more on the wording of the provision. It has stated that a provision must be sufficiently clear, precise and limited so that only entirely exceptional cases are punished.¹⁵⁶ One example is found in *AFJR*,¹⁵⁷ where Romanian judges could risk financial liability for ‘judicial errors’. The ECJ found it permissible to have such general and abstract provisions in theory, but not if they were interpreted in such a way that judges could be held personally liable for the simple fact that a decision contained a judicial error.¹⁵⁸

Similarly, in the first complaint in *Commission v Poland (Disciplinary regime of judges)*,¹⁵⁹ judges could be held liable for ‘errors’ entailing an ‘obvious’ violation of law. This provision had been given a broad interpretation in recent case-law, and the ECJ took the view that it risked judges being held liable solely for the ‘incorrect’ content of their decisions, which undermined independence.¹⁶⁰

Lastly, in *Commission v Poland (Indépendance et vie privée des juges)*,¹⁶¹ the provisions were wide enough to, in practice, allow judges to be held liable for considering the independence of a judge or court under Article 19(1) TEU or Article 47 CFR. The Court therefore found that the provisions were both insufficiently precise, and that such liability by its nature could undermine independence.¹⁶²

While the case-law is quite casuistic, the common thread seems to be that liability is problematic where it by its nature isn’t suitable or necessary for ensuring the sound administration of justice, or where it is so vague and imprecise that it cannot be sufficiently delimited. More generally, a useful yardstick seems to be how well disciplinary liability balances the need to ensure accountability with the need to safeguard independence.

Regarding the second requirement of ensuring sufficient safeguards to avoid political abuse,¹⁶³ the ECJ has stated that the mere prospect of disciplinary proceedings without sufficient safeguards, or by a body lacking independence, can have a chilling effect on judges that undermine their

¹⁵³ Case C-564/19 *IS* EU:C:2021:949 para 91; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 234. Both cases were considered exclusively under Article 267 TFEU, but the result would likely have been the same if considered under Article 19(1) TEU. See also Joined Cases C-558/18 and C-563/18 *Łódzki and Others* EU:C:2020:234 paras 55–59.

¹⁵⁴ *Euro Box Promotion and Others* (n 24); *RS* (n 23).

¹⁵⁵ *Euro Box Promotion and Others* (n 24) paras 238–243; *RS* (n 23) paras 81–89.

¹⁵⁶ *AFJR* (n 32) para 234; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 140. cf the HRC General Comment no. 32 (n 32) para 19.

¹⁵⁷ *AFJR* (n 32).

¹⁵⁸ *ibid* paras 228–241, see especially 234. The main problem in the case was however the lacking safeguards.

¹⁵⁹ *Commission v Poland (Disciplinary regime of judges)* (n 32).

¹⁶⁰ *ibid* paras 134–158, especially 144; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) paras 164–169.

¹⁶¹ *Commission v Poland (Indépendance et vie privée des juges)* (n 4).

¹⁶² *ibid* paras 134–163.

¹⁶³ See *LM* (n 53) para 67; *W.Ż.* (n 67) para 113.

independence.¹⁶⁴

A disciplinary regime must therefore ensure that the procedures fulfil the requirements ‘of a fair trial, and, in particular, the requirements relating to the respect for the right of the defence’.¹⁶⁵ This includes the right to challenge disciplinary liability before a body or court which itself fulfils the requirements of independence.¹⁶⁶ The Court has even recently confirmed, in *YP and Others*, that national courts are required to disregard suspensions of duty and transfers of cases coming from the bodies, like the Polish Disciplinary Chamber, whose independence is not guaranteed.¹⁶⁷

These guarantees of a fair trial were not upheld in *Commission v Poland (Disciplinary regime of judges)*.¹⁶⁸ The Disciplinary Chamber of the Supreme Court was not sufficiently independent¹⁶⁹ and had excessive power to determine which court had jurisdiction in the first instance, allowing it to influence proceedings.¹⁷⁰ Moreover, the system allowed for the possibility of judges being investigated indefinitely¹⁷¹ and allowed for proceedings to go on despite the justified absence of the accused or their counsel.¹⁷² The ECJ also criticised lacking safeguards in *AFJR*, because the legislation did not ensure the right of the defendant judge to be heard.¹⁷³

Furthermore, because an initiation of disciplinary proceedings in general can have a chilling effect, the independence of the investigators and prosecutors must also be ensured.¹⁷⁴ In *AFJR* the Public Prosecutors office was not sufficiently independent, and could be used to pressure the judges,¹⁷⁵ there were not sufficient resources to conduct investigations within a reasonable time,¹⁷⁶ and the minister was left large discretion in whether to commence proceedings or not, which created a risk of undue pressure on judges.¹⁷⁷

In *Inspekția Judiciară*,¹⁷⁸ the chief inspector had large powers over the inspectorate and decisions to initiate disciplinary proceedings. If the chief inspector misused their power, proceedings could only be brought by deputy inspectors, over whom the chief had large influence. The Court therefore found that the national legislation lacked safeguards for preventing disciplinary proceedings being misused to pressure judges.¹⁷⁹

In total, a disciplinary regime can be used for political interference or at least have a

¹⁶⁴ *AFJR* (n 32) para 236; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 101.

¹⁶⁵ *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 203 and 213; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 95.

¹⁶⁶ *Commission v Poland (Disciplinary regime of judges)* (n 32) para 82. See also paras 88–112 for the consideration of the Disciplinary Chamber. From the ECtHR, see, inter alia, *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) paras 109–117; *Denisov v. Ukraine* App no 76639/11 (ECtHR, 25 September 2018) para 72.

¹⁶⁷ Joined Cases C-615/20 and C-671/20 *YP and Others (Levée d’immunité et suspension d’un juge)* EU:2023:562 paras 50 ff.

¹⁶⁸ *Commission v Poland (Disciplinary regime of judges)* (n 32).

¹⁶⁹ *ibid* paras 88–112.

¹⁷⁰ *ibid* paras 164–176.

¹⁷¹ *ibid* paras 189–202.

¹⁷² *ibid* paras 208–213.

¹⁷³ *AFJR* (n 32) para 239.

¹⁷⁴ Case C-817/21 *Inspekția Judiciară* EU:C:2023:391 para 49.

¹⁷⁵ *AFJR* (n 32) paras 216–220. See also paras 199–200.

¹⁷⁶ *ibid* paras 221–222.

¹⁷⁷ *ibid* paras 239–241.

¹⁷⁸ *Inspekția Judiciară* (n 174).

¹⁷⁹ *ibid* paras 53–73.

chilling effect. To avoid this, Member States must ensure that disciplinary liability is used only where strictly necessary, and with sufficient safeguards against abuse. That requires independent investigations and proceedings which uphold fair-trial standards.

8 THE USE OF JUDICIAL COUNCILS TO ENSURE INDEPENDENCE

Judicial councils are commonly used by the Member States to safeguard judicial independence in various processes which can affect the judge or the judiciary.¹⁸⁰ The term ‘judicial council’ refers to a type of institution which, while varying in composition and competences among Member States,¹⁸¹ plays an important role in establishing a degree of autonomy and judicial representation for the administration of the judiciary.

Judicial councils have been mentioned several times in this article as a possible safeguard of independence. This section will take a closer look at what is required of councils if they are to fulfil the role of a safeguard under Article 19(1) TEU. As a starting point, the ECJ has stated that councils themselves must be sufficiently independent.¹⁸²

That was not the case in *A.K. and Others* and *Commission v Poland (Disciplinary regime of judges)*, where the ECJ found that the Polish National Council of the Judiciary was not sufficiently independent, for three reasons. Firstly, Poland’s reform of the Council had reduced the terms of existing members so that they could be replaced by the new ones. Secondly, the vast majority of judges elected to the Council were appointed by the legislative and executive branches. Thirdly, these changes came at the same time as lowering the retirement ages of judges and the establishment of two new Supreme Court chambers with vacant posts for the council to fill.¹⁸³

In other words, members of judicial councils must, like judges, have some form of security of tenure, and there cannot be excessive legislative and executive influence on such councils. However, this doesn’t preclude that the legislative or executive branch can appoint some of the members. In *Land Hessen*, 7 out of 13 council members were appointed by the legislature.¹⁸⁴ The Court acknowledged it as one factor which could affect the independence but stated that it was not sufficient by itself to undermine the independence of an appointee to the council.¹⁸⁵

This balance struck by the Court in *Land Hessen* seems to be to a large extent in line with the recommendations of the Venice Commission. It has recommended a balanced composition, to ensure both accountability and autonomy.¹⁸⁶ However, because the primary

¹⁸⁰ See the Opinion of AG Tanchev in *A.K. and Others* (n 29) point 124, with further references. Ad hoc assessment boards can fulfil some of the same roles, see *AFJR II* (n 36) para 75.

¹⁸¹ See for their composition and role in appointments: CJEU, *Direction de la recherche et documentation* (n 83) paras 14–51.

¹⁸² *A.K. and Others* (n 31) paras 137–138; *A.B. and Others* (n 81) paras 124–125; *Repubblika* (n 76) para 66.

¹⁸³ *A.K. and Others* (n 31) para 143; *Commission v Poland (Disciplinary regime of judges)* (n 32) paras 103–108. See also the case-law of the ECtHR on the Polish judicial council: *Reczkowicz v Poland* App no 43447/19 (ECtHR, 22 July 2021) paras 225–282; *Dolińska-Ficek and Ożymek v Poland* Apps nos 49868/19 and 57511/19 (ECtHR, 8 November 2021) paras 281–320 and 340–355; *Advance Pharma* (n 78) paras 303–321 and 336–351.

¹⁸⁴ *Land Hessen* (n 86) para 53.

¹⁸⁵ *ibid* paras 54–58. The case was decided under Article 267 TFEU, but was reiterated in *Commission v Poland (Disciplinary regime of judges)* (n 32) para 103.

¹⁸⁶ Venice Commission, ‘Judicial Appointments’ (n 89) para 27.

function of such councils is ensuring judicial independence, it recommends that the majority of members be elected by the judiciary.¹⁸⁷

When evaluating how effective such councils are at safeguarding judicial independence, the ECJ will overlook issues or irregularities that are of a more technical or minor nature. This is clear from *Getin Noble Bank* where a provision regulating security of tenure for, and rules for the distribution of, members of the judicial council had been declared unconstitutional. The ECJ stated that this issue, unlike those in *A.K. and Others* and *Commission v Poland (Disciplinary regime of judges)* discussed above, had not reinforced the influence of the executive or legislative branches in appointment procedures.¹⁸⁸

Lastly, if a judicial council is to act as an effective safeguard, it must not only be independent, but also have sufficient powers and jurisdiction. An example is *Repubblika*.¹⁸⁹ The Maltese president did not have to follow the recommendations of the Judicial Appointment Committee, but had to state sufficient reasons for any divergence from the recommendations. The ECJ found that such powers were sufficient to act as a safeguard on presidential appointments.¹⁹⁰

In conclusion, judicial councils are an effective way of ensuring judicial autonomy and self-administration in procedures and for measures affecting the judiciary.¹⁹¹ Article 19(1) TEU does not oblige Member States to establish such bodies, and it might not be necessary in states where legal culture or other types of institutions can ensure the same result.

9 ENSURING THE AVAILABILITY OF REMEDIES AND SUBSEQUENT CONTROL

This section will consider the relevance of existing national remedies and subsequent control within the domestic system for upholding independence under Article 19(1) TEU. Remedies are important because they, if sufficient, can allow the national legal system to ‘fix’ the elements and issues that might otherwise restrict or threaten independence under Article 19(1) TEU.

The ECJ has, for example, stated that the existence of judicial review for an appointment decision is an important factor that could help safeguard against improper exercise of authority or errors in law or assessment of facts,¹⁹² and that the ‘existence of a judicial remedy available to unsuccessful candidates [...] would be necessary in order to help safeguard the process’.¹⁹³ Furthermore, the sudden removal of existing possibilities of a remedy or review can give rise to doubts as to whether independence is being upheld.¹⁹⁴ Remedies can also act as a guarantee for decisions taken by bodies which themselves are not

¹⁸⁷ *ibid* para 29; Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) paras 31–32. See also the Opinion of AG Tanchev in *A.K. and Others* (n 29) point 126.

¹⁸⁸ *Getin Noble Bank* (n 30) paras 125–128.

¹⁸⁹ *Repubblika* (n 76).

¹⁹⁰ *ibid* paras 66–72.

¹⁹¹ Including, *inter alia*, appointments, disciplinary proceedings and financial autonomy. See Venice Commission, ‘Report on the Independence of the Judicial System Part I’ (n 27) paras 43 and 55.

¹⁹² See, *inter alia*, *A.K. and Others* (n 31) para 145; *A.B. and Others* (n 81) para 128.

¹⁹³ *A.B. and Others* (n 81) para 136. However, this does not oblige Member States to allow remedies also for representative organisations. See the Opinion of AG Collins in Case C-53/23 *AFJR III* EU:C:2024:104 para 32 ff.

¹⁹⁴ *A.B. and Others* (n 81) para 129.

independent.¹⁹⁵ More generally, remedies and review act as a guarantee that procedures were conducted with no undue interferences.

However, some measures affecting independence cannot, by their nature, be fixed by available remedies. The ECJ generally does not refer or consider remedies in cases where the rules and systems themselves are the problem. The availability of remedies does not fix a disciplinary provision being too vague, or the lack of rules on how cases should be assigned. Instead, such issues will remain restrictive of independence as long as they remain in force.

10 POTENTIAL JUSTIFICATION OF RESTRICTIONS OR THREATS TO INDEPENDENCE

10.1 SOME RESTRICTIONS CAN BE JUSTIFIED

When discussing the requirements under Article 19(1) TEU, this article has occasionally used the terminology of when measures create ‘issues’ or ‘threats’ for independence, rather than asking definitively when there is a breach of Article 19(1) TEU. This is because whether a measure is in breach of Article 19(1) TEU or not, at least in some cases, can depend on the *justification* presented by the Member State.

The ECJ has not established a general test for when it will find a breach for Article 19(1) TEU, nor does it consistently apply any balancing test allowing for justification. Rather, in most cases it seems to apply a threshold test where the measure either undermines independence or not. There could be many reasons for why justifications only come up in some cases, including the nature of the issue or simply whether the Member State in question alleged any justifying objectives before the Court or not. The case-law so far has a very ad hoc approach in this area, and one can only hope that the Court clarifies it going forward.

That said, this section will take a closer look at the cases where the Court does, at minimum, indicate that justification by some type of legitimate aim is relevant to whether there is a breach of Article 19(1) TEU. Statements indicating that restrictions on independence can be justified by legitimate objectives are found in many cases, but especially in two types of cases:

Firstly, in cases on the principle of *irremovability*, the ECJ has stated that removal by the lowering retirement ages¹⁹⁶ and the transfer of a judge without consent¹⁹⁷ are measures which must be justified by the pursuit of a legitimate aim. Secondly, for the establishment of *disciplinary regimes*, the Court has emphasised that any liability must be justified,¹⁹⁸ and the same for restrictions on the procedural rights of judges in disciplinary proceedings.¹⁹⁹

There seems to be no reason why justifications of restrictions or threats to independence should be limited to these two types of cases. Rather, it seems more likely that

¹⁹⁵ C-403/16 *El Hassani* EU:C:2017:960 para 39.

¹⁹⁶ *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 77 and 79; *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 113 and 115. See for the possibility of continuing beyond retirement age, the Opinion of AG Rantos in *Krajova Rada Sądowictwa (Maintien en fonctions d'un juge)* (n 103), points 48 and 70.

¹⁹⁷ *W.Ż.* (n 67) paras 112 and 118; the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)* (n 47) points 72–80.

¹⁹⁸ See *AFJR* (n 32) paras 213 and 233; *Commission v Poland (Disciplinary regime of judges)* (n 32) para 139; *Euro Box Promotion and Others* (n 24) paras 239–240; *RJ* (n 23) para 86; *Commission v Poland (Indépendance et vie privée des juges)* (n 4) para 127. cf. also the Opinion of AG Bobek in *AFJR* (n 30) point 295.

¹⁹⁹ *Commission v Poland (Disciplinary regime of judges)* (n 32) para 207.

these are just case types where Member States might often have legitimate aims, like transferring judges to reorganise courts or establishing disciplinary liability to combat corruption. This could at least explain why it came up or was alleged in the proceedings of these cases. In principle, the points discussed here should therefore apply to other types of restrictions and threats for which a Member State alleges legitimate aims.

10.2 LEGITIMATE OBJECTIVE

The ECJ has not elaborated much on what constitutes a ‘legitimate objective’. In the case-law that deals with disciplinary regimes for judges it has taken a narrow approach, stating that disciplinary liability must be justified by objectives relating to the ‘sound administration of justice’.²⁰⁰

Such objectives have also been accepted in the cases on *irremovability* of judges. The Court stated generally that judges being deemed unfit to carry out their duties constitutes legitimate grounds for removal.²⁰¹ AG Campos Sánchez-Bordona has also argued that, in regards to the abolish of a court and the unvoluntary transfer of judges, the reorganisation of the judicial system in order to make it more effective and better uphold independence was a legitimate aim relating to the sound administration of justice.²⁰² In general it seems clear that the necessities of justice and the judiciary itself can constitute legitimate aims.

The Court has also accepted more general policy objectives. In *Commission v Poland (Independence of the Supreme Court)*, the Court accepted that employment policy objectives like standardising retirement ages and a better age balance at the court could constitute legitimate objectives for lowering retirement ages of the Supreme Court’s judges.²⁰³ The judgments in *ASJP* and *Vindel* can also be read such that reducing an ‘excessive budget deficit’ was as legitimate reasons to justify lowering wages of judges.²⁰⁴ In *W.Ż.*, the Court mentions ‘distribution of resources’ more generally as a potential justification for the transfer of a judge.²⁰⁵

Overall it seems likely that the Court could accept a variety of policy objectives as legitimate aims. That would be in line with how legitimate aims is considered in other areas of EU law, where only more irrational or arbitrary objectives will be seen as illegitimate.²⁰⁶

10.3 PROPORTIONALITY

If the Court finds the objective to be legitimate, it will also have to consider whether the restriction is proportionate to that objective. Proportionality is a general principle of EU law,²⁰⁷ codified in Article 52(1) CFR. The ECJ has affirmed a principle of proportionality

²⁰⁰ *ibid.*

²⁰¹ *Commission v Poland (Independence of the ordinary courts)* (n 120) para 113; *W.Ż.* (n 67) para 112.

²⁰² See the Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d’un Tribunal)* (n 47) point 65 and implicitly in points 74–80.

²⁰³ *Commission v Poland (Independence of the Supreme Court)* (n 12) para 81.

²⁰⁴ *ASJP* (n 5) para 46; *Vindel* (n 52) para 67. The cases can also be read such that the measure just did not threaten independence, with no need for justification.

²⁰⁵ *W.Ż.* (n 67) para 118, also mentioning the sound administration of justice as a legitimate objective.

²⁰⁶ Tobias Lock, ‘Article 52 CFR’ in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2252.

²⁰⁷ Case C-482/17 *Czech Republic v Parliament and Council* EU:C:2019:1035 para 76; Case C-452/20 *PJ* EU:C:2022:111 para 36.

as a part of justification under Article 19(1) TEU in several cases.²⁰⁸

Despite affirming a principle of proportionality, there are very few cases where the Court actually conducts a clear proportionality analysis under Article 19(1) TEU. The clearest example is found in *Commission v Poland (Independence of the Supreme Court)*. The Court firstly stated that lowering retirement ages seemed *inappropriate* to achieve the objective of standardising retirement ages, because judges could continue their work with a presidential approval.²⁰⁹ Secondly, that Poland had not explained why it was *necessary* to design the rules in that manner.²¹⁰ And thirdly, seemed to indicate that the measures, on balance, restricted independence too much for them to be proportionate *stricto sensu*.²¹¹

This case is interesting because the ECJ seems to consider all elements of proportionality (*appropriateness, necessity, and proportionality stricto sensu*). This contrasts with the general approach of CJEU of focusing primarily on *appropriateness* and *necessity* while leaving proportionality for the national court or national politics.²¹² The case might indicate that rule of law-issues is an area where the Court is more inclined to closely review the proportionality of Member States' restrictions.

A less clear but still interesting example of a proportionality analysis is found in the recent Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)*.²¹³ The case concerned the transfer of judges against their will in the context of a reorganisation of the judicial system. AG Campos Sánchez-Bordona found that this transfer was not contrary to the principle of irremovability, including the requirement of proportionality. It was a legitimate reorganisation of the judiciary, and the AG emphasised that the judges were transferred to a court with the same rank, according to general criteria, with no disruption or intrusion of their existing cases.²¹⁴

The case illustrates that even if there is a proportionality requirement, Member States are left a large room for democratic governance. General measures done according to proper procedures will usually only pose a small or minimal threat to judicial independence.

In all the cases dealing with disciplinary regimes, which as mentioned had to be justified by objectives relating to the 'sound administration of justice', the ECJ does not mention proportionality explicitly. However, as discussed in section 7, the Court does apply a test of whether liability is limited to the 'entirely exceptional'. This is quite reminiscent of a test of *necessity*, meaning whether the measure goes beyond what is necessary to achieve its aim. Even if the ECJ doesn't explicitly consider proportionality, it therefore achieves some of the same balancing with other words. However, in line with Venice Commission recommendations that disciplinary liability should be proportional to the problem it is trying to solve,²¹⁵ there

²⁰⁸ *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 76, 79 and 89–95. Reiterated in *Commission v Poland (Independence of the ordinary courts)* (n 120) paras 113 and 115; *W.Ż.* (n 67) para 112. See also *Commission v Poland (Disciplinary regime of judges)* (n 32) para 207; Opinion of AG Rantos in *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* (n 103) points 76–79.

²⁰⁹ *Commission v Poland (Independence of the Supreme Court)* (n 12) paras 89–90.

²¹⁰ *ibid* para 90.

²¹¹ *ibid* paras 91–93.

²¹² Lenaerts, Van Nuffel and Corthaut (n 21) 106–107.

²¹³ Opinion of AG Campos Sánchez-Bordona in *OT and Others (Suppression d'un Tribunal)* (n 47).

²¹⁴ *ibid* points 72–80. See also points 51–71.

²¹⁵ Venice Commission, 'CDL-AD(2015)042, Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the Former Yugoslav Republic of Macedonia"' para 18; Venice Commission, 'CDL-

is certainly room for the Court to clarify its approach.

As this overview of case-law illustrates, it is clear that some restrictions or threats to independence can be justified by a legitimate and proportionate aim, but also that the Court rarely engages in any substantive analysis of proportionality. It remains to be seen whether this is deliberate or mostly a consequence of what has been argued before the Court. This author is of the opinion that a proportionality test would be useful in many cases under Article 19(1) TEU and would allow the Court to more clearly separate legitimate democratic policies from situations of early *rule of law-backsliding*.

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