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Review article

THE GROWING ROLE OF SOCIAL CONTEXT AS A CRITERION OF JUDICIAL INDEPENDENCE

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ABSTRACT

Judicial independence is immanently connected with the rule of law and as such is regularly scrutinized by multiple international organizations. Bodies such as the Council of Europe and the Venice Commission have issued numerous "soft law" instruments establishing guidelines for judicial independence standards. Meanwhile, the European judiciary system, on its part, has analyzed and ruled on specific issues on a case by case basis.

The judiciary reforms introduced in Poland within the past decade have sparked immense discussions as to whether they remain in line with the EU rule of law, in particular whether the judicial independence standard has been upheld or jeopardized. As a result, an ideal environment has been created for the European Court of Justice to shape the EU standards, as the number of recent rulings on the matter of judicial independence has grown rapidly. While the European Court of Justice is key in establishing common standards across the EU, the Court seemingly avoids creating general, common standard of judicial independence.

Recently, while assessing the judicial independence the European Court of Justice has focused on aspects such as social perception and impressions of individuals involved in the proceedings, thus stressing the importance of the "context", rather than working towards establishing a clear European standard for the assessment of the independence (or lack thereof) of judges. With such ambiguous rules, however, it cannot be excluded that an objectively independent court could fail the test due to e.g. a widespread misinformation campaign, while a judiciary subjected to numerous minor reforms kept under the radar of the public eye, which effectively undermine its independence, could avoid the ECJ's scrutiny. As the concerns regarding the future of the rule of law in the European Union spread, the need for a clear and objective roadmap becomes more evident.

In this context, this article aims at analyzing a sample of three recent ECJ cases: Land Hessen (Case C-272/19), W. B. et al. (Joined Cases C 748/19 to C 754/19) and Asociația "Forumul Judecătorilor din România" (Case C-216/21) in order to assess whether such roadmap has been created – or whether steps towards its creation have been taken by the European institutions.

Keywords*: judicial independence; social perception test of judiciary independence; rule of law; EU standards on independence of judiciary.*

1. INTRODUCTION

Anyone looking for the core principles of the European Union will inevitably come across numerous analysis and references to the concept of judicial independence[1]. The independence of the judiciary is one of the foundations underlying the rule of law, which – as set forth in Article 2 of the Treaty on European Union – is one of the core values[2] the European Union is founded on: "These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[3] Such is the importance of the rule of law for the European integration process that since 1993 it has been included as one of the accession criteria against which applications of the countries willing to join the EU are assessed.[4]

The concept of rule of law is not easily definable. On one hand, its importance and fundamental meaning for the integration of the Union requires it to be a supranational concept. On the other hand, "the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system".[5] The European diversity is additionally strengthened by the fact that the organization of justice in the Member States falls within the competence of those Member States. The systems can differ greatly, thus setting common standards can be very challenging. However, the organization of justice does not remain completely outside of the European control – the European Court of Justice (hereinafter as "the ECJ") has confirmed, that it has the right to examine if the Member States fulfil their requirement to comply

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1 Mikłaszewicz P., *Niezależność sądów i niezawisłość sędziów w kontekście zasady rządów prawa - zasadniczy element funkcjonowania UE w świetle orzecznictwa TSUE*, PiP 2018/3.

2 "Needless to say, just as happens at national level, those three values are interdependent at EU level: there can be no democracy without the rule of law and fundamental rights; there can be no rule of law without fundamental rights and democracy, and there can be no respect for fundamental rights without democracy and the rule of law. From a constitutional perspective, this means that the EU may be described as a 'Union of democracies', a 'Union of justice' and a 'Union of rights'.", Lenaerts, K., *The European Union as a Union of Democracies, Justice and Rights*, International Comparative Jurisprudence, Vol. 3, Issue 2, 2017.

3 Article 2 of the Treaty on European Union (Consolidated version 2016), OJ C 202, 7 June 2016 (hereinafter as "TEU").

4 Article 49 of the TEU.

5 Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

with their obligations deriving from EU law[6, 7], which can at times be connected with assessment of certain elements of justice organization of a Member State.

In order to better define the rule of law, as well as the concept of judicial independence, a number of guidelines have been prepared.[8] Additionally, both the independence of the judiciary and the rule of law have been discussed extensively throughout the time of European Union's existence and yet the interest in and the frequency of these two concepts coinciding has grown immensely in recent years.[9] However, the role of the ECJ has remained the closest to the core of judicial independence, as the issues and doubt connected with Member States' solutions were brought to the ECJ to be assessed in specific cases.[10]

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6 "the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (see, by analogy, judgments of 13 November 2018, Raugevicius, C-247/17, EU:C:2018:898, paragraph 45, and of 26 February 2019, Rimšēvičs and ECB v Latvia, C-202/18 and C-238/18, EU:C:2019:139, paragraph 57) and, in particular, from the second subparagraph of Article 19(1) TEU (see, to that effect, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 40). Moreover, by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore, contrary to what is alleged by the Republic of Poland, arrogating that competence." - Case C-619/18, European Commission v Republic of Poland, paragraph 52. See also: Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), paragraph 68; Case C-896/19, Republika, paragraph 48; Case C-487/19, W. Ż. V KRS, paragraph 75.

7 See also: Pech L.; Platon S., *Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case*, Common Market Law Review, 55, 2018, pp. 1827 – 1854.

8 See e.g. European Commission For Democracy Through Law (Venice Commission), *Rule Of Law Checklist*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016); European Commission For Democracy Through Law (Venice Commission), *Report On The Independence Of The Judicial System Part I: The Independence Of Judges*, Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010); *Recommendation (94)12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges*, (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

9 During the Conference "*WJA Tribute to Anthony M. Kennedy*" organized on 4-5 March 2024 by the World Jurist Association (a non-governmental organization in special consultative status with the United Nations ECOSOC) one of the Panels has been dedicated to the topic of "*Independence of the Judiciary and the Rule of Law*" – the speakers included e.g. Presidents of highest judiciary bodies from around the world.

10 „Submitting more than a dozen references for a preliminary ruling in recent years bears proof that doubts related to the independence of courts, especially in the external aspect, are being tackled by courts of various member states, which in turn shows that on the level of the European Union (hereinafter: EU), this problem is still current and unsolved.", Celiński M., *Independence of the courts and judges in Germany and the Land of Thuringia in the light of the case law of the Court of Justice. Case study – analysis of the reference for a preliminary ruling brought by the Landgericht Erfurt in the case of A.G.E. p. BAG (C-276/20)*, International Law Quarterly 2023, I (I), p. 59.

2. IN SEARCH OF THE COMMON STANDARD – THE ECJ CASE LAW

As the discussion on the rule of law backsliding in the European Union made its way into the ECJ, an opportunity presented itself to steer the case law in the direction of coherent set of rules and standards, pointing out the core fundaments of judicial independence. As was especially underlined by the President of the Court of Justice of the European Union "whilst the topic of judicial independence, as a core constituent of the respect for the rule of law, is often perceived as a "regional" or an "era-specific" issue, it is in fact a universal yardstick of a functioning democracy, to which all Member States must be – and are - held accountable in the same manner."[11]

The concept of judicial independence in the case law of ECJ is rooted in the Wilson ruling of 2006[12,13], however, the ECJ case law on the matter has grown significantly since then. In a briefing note of the European Parliamentary Research Service published in October 2023[14], which regards recent ECJ case law on judicial independence and covers the period of years of 2018 up to 2023, twenty-three ECJ cases were analyzed. Out of those, sixteen involved (directly or indirectly) the Polish courts. While the disputes surrounding the Polish judiciary and the rule of law have mostly monopolized the academic discussion, the subject of judicial independence most certainly has to be debated in a broader context (especially in light of the fact that the European Commission has finalized its analysis on the rule of law situation in Poland in the context of the Article 7(1) TEU procedure[15]). While the framework of an article does not allow to study all of the recent ECJ case law, in this paper I would like to analyze in more detail three of the recent ECJ rulings, with each of them regarding the judiciary system of a different Member State (Germany, Poland and Romania). The focus on cases concerning different Member States aims to verify what were the tests performed by the ECJ and whether they can indeed create a clear and abstract standard for the future where the rule of law backsliding may appear in many shapes and forms.

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11 Lenaerts, K., *Rządy prawa w Unii Europejskiej*, Europejski Przegląd Sądowy, Wolters Kluwer, nr 7(214)/2023, p. 4.

12 Case C-506/04, Wilson, EU:C:2006:587.

13 Lenaerts, K., *Rządy prawa w Unii Europejskiej*, Europejski Przegląd Sądowy, Wolters Kluwer, nr 7(214)/2023, p. 4.

14 Mańko, Rafał, *ECJ case law on judicial independence. A chronological overview*, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)753955], Accessed 15 April 2024.

15 European Commission press release, *Commission intends to close Article 7(1) TEU procedure for Poland*, [https://ec.europa.eu/commission/presscorner/detail/nl/ip_24_2461], Accessed 22 May 2024.

2.1. The Land Hessen Case (C-272/19)

In case C-272/19 (*VQ v Land Hessen*) a German court made a request for a preliminary ruling in a personal data case. However, the court additionally expressed its doubt as to its status as a "court or tribunal" within the meaning of Article 267 TFEU[16], read together with the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter as the "Charter"), in the light of the criteria set out by the ECJ in that regard, in particular the criterion pertaining to the independence of the body concerned.[17]

The German court referred to the (previously established in the ECJ case law) existence of two aspects of judicial independence[18]. The external one, assuming that the judicial functions are exercised autonomously, without subordination to any other body, which aims to ascertain that an independent judgement, free from external influence, will be granted; and the internal one, closely linked to the concepts of impartiality and objectivity, allowing for a strict application of the rule of law and absence of judge's interest in the outcome of the proceedings.

The doubts of the referring court were connected with both the external and internal aspects of its independence. As pointed out in the request, the organization of the courts or tribunals in Land Hessen is determined by the Ministry of Justice of that Land. As a result, the Ministry decides on the appointment, appraisal and promotion of judges (including those who are members of the referring court) and decides on the work-related travel abroad of judges. Additionally, the Ministry influences also the everyday aspects of the organization of the judiciary, as it determines (among others) the means of communication and the IT facilities. More concerns were raised in relation to the governance of the personnel employed in the courts – German laws allow for a public official to be appointed as a temporary judge in cases of additional staff needs; the Ministry of Justice decides also on the number of judges and number of posts at each court or tribunal. When it comes to the Judicial Appointments Committee, the referring court brought to the ECJ's attention the fact, that the majority of its members are chosen by the legislature.

While assessing the doubts raised by the referring court, the ECJ seems to have made three main arguments. Firstly, none of the concerns raised, including the fact that the referring judge himself had doubts about his own independence, did not

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16 Treaty on the Functioning of the European Union (Consolidated version 2016), OJ C 202, 7 June 2016 (hereinafter as "TFEU").

17 Case C-272/19 *VQ v Land Hessen* [2020], paragraph 26.

18 Kalisz, A.; Wojciechowski, B, *Standardy niezależności sądów i niezawisłości sędziowskiej – wybrane zagadnienia na przykładzie orzecznictwa sądów europejskich*, in: Przegląd Sejmowy, Wydawnictwo Sejmowe, nr 5(172)/2022, p. 271.

imply on their own a lack of judicial independence[19], neither such doubts should arise simply due to the fact that the majority of members of the Judicial Appointment Committee are chosen by the legislature[20]. Secondly, the ECJ's statements indicate that the alleged acts of influence of legislative or executive branch, which are infringing the judiciary's independence should be proved, not just hypothetically possible[21].[22] Thirdly, once again the social perception test has been cited as a binding standard of EU assessment of judicial independence.[23]

2.2. W. B. *et al.* (Joined Cases C 748/19 to C 754/19)

In joined cases C 748/19 to C 754/19 seven requests for a preliminary ruling were submitted. One of the questions raised in the requests concerned the inter-

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19 When commenting on the fact that the majority of the Judicial Appointment Committee are chosen by the legislature, the ECJ stated: "However, that fact cannot, in itself, give rise to any doubt as to the independence of the referring court. The assessment of the independence of a national court or tribunal must, including from the perspective of the conditions governing the appointment of its members, be made in the light of all the relevant factors. […] In this instance, it cannot be concluded that a committee such as that at issue in the main proceedings is not independent solely because of the factor mentioned in paragraph 55 of the present judgment." – Case C-272/19 VQ v Land Hessen [2020], paragraph 56 and 58.

20 It was, however, not clarified why the composition of the Appointment Committee of which the majority of the members are chosen by the legislature does not give rise to doubts as to the principle of independence. See: Beems, B., *VQ v Land Hessen: From 'Court of Tribunal' in the Meaning of Article 267 TFEU to the GDPR's Concept of a 'Controller'*, European Data Protection Law Review, 7(2), 2021, p. 300.

21 "As regards, in the second place, the role of the Ministry of Justice of Land Hessen with respect to the management of work-related travel of judges or the organisation of the court or tribunals, the determination of staff numbers, the management of means of communication and IT facilities, as well as the management of personal data, suffice it to state that the request for a preliminary ruling contains no information from which it can be ascertained to what extent those factors are liable to call into question, in the main proceedings, the independence of the Verwaltungsgericht Wiesbaden (Administrative Court of Wiesbaden)." – Case C-272/19, *VQ v Land Hessen* [2020], paragraph 50.

22 "As regards the conditions governing the appraisal and promotion of judges, which are also called into question by the Verwaltungsgericht Wiesbaden (Administrative Court of Wiesbaden), suffice it to state that the documents submitted to the Court contain no indication as to how the manner in which the executive uses its powers in that regard are such as to engender legitimate doubts, particularly in the minds of litigants, concerning whether the judge concerned is impervious to external elements and whether he or she is impartial with respect to the opposing interests that may be brought before him or her." – Case C-272/19, *VQ v Land Hessen* [2020], paragraph 59.

23 "In accordance with settled case-law, the guarantees of the independence and impartiality of the courts and tribunals of the Member States require rules, particularly as regards the composition of the body and the appointment and length of service of its members, and as regards grounds for withdrawal by, objection to, and dismissal of its members, in order to dispel any reasonable doubt in the minds of litigants as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 21 January 2020, Banco de Santander, C-274/14, EU:C:2020:17, paragraph 63 and the case-law cited)." – Case C-272/19, *VQ v Land Hessen* [2020], paragraph 52.

pretation of the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU. The referring court's doubts were connected with the composition of the adjudicating panels (called upon to rule on the above-mentioned cases), as concerns arose whether they are in line with the second subparagraph of Article 19(1) TEU, having regard to the presence in those panels of a judge seconded in accordance with a decision of the Polish Minister for Justice.

Among numerous judicial reforms introduced in Poland, the one that was subjected to ECJ's analysis in the case at hand was a regulation allowing the Minister for Justice to assign a judge (by way of secondment) to a higher court. The doubts were connected with the fact that the secondment criteria were not specified and the secondment decision was not amenable to judicial review. Additionally, the Minister could terminate a judge's secondment at any time, without such termination being subject to criteria that were predefined by law or having to be accompanied by a statement of reasons.

In view of the referring court those circumstances could allow the Minister to influence the seconded judges in two ways. Firstly, a secondment of a judge to a higher court could be perceived as a 'reward' granted by the Minister to such judge for the work performed by him or her in previous positions, or even set out certain expectations as to how that judge might adjudicate in the future, with that secondment then being a substitute for a promotion. Secondly, by terminating a judge's secondment, the Minister for Justice may 'penalize' that seconded judge for having adopted a judicial decision which did not approve of.

The ECJ stressed that even though the Member States have full competence in the field of the organization of justice, they are required to comply with their obligations deriving from EU law, in particular when drawing up national rules relating to the secondment of judges. The ECJ's analysis again focused on three points of discussion. Firstly, each of the issues raised by the referring court has been analyzed in detail, both separately, as well as together with all of the other cited circumstances in order to establish if the judicial independence may be endangered. Secondly, the ECJ's concerns were connected with the possibility that the Minister's decisions (which could be arbitrary, as no strict prerequisites of a secondment or its cancelation were introduced) may have such effect, that the judge's independence and appearance of impartiality may be undermined[24]. The

[24] "The rules applicable to the status of judges and the exercise of their judicial functions must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire

judgment does not mention any proof of Minister's influence on seconded judges, thus it must be assumed that the risk of influence has remained only hypothetical throughout the proceedings[25], which in this case (as opposed the Land Hessen case) was judged as a sufficient risk by the ECJ. Finally, the social perception test was cited[26], however, in this case the ECJ was very heavily[27] leaning towards a different final opinion than in Land Hessen case (while emphasizing that the final assessment is to be carried out by the referring court), indicating that the standards of judicial independence have been violated.

2.3. Asociaţia "Forumul Judecătorilor din România" (C-216/21)

The most recent case regarding judicial independence has been issued as a result of a request for a preliminary ruling of a Romanian court. In light of the arguments presented to the referring court by a Romanian association of judges, the referring court had doubts as to the compatibility of a promotion scheme of judges introduced by a new Romanian law with the principle of the independence of judges.[28]

The new system for promotions to a higher court introduced a procedure allowing for the promotion of a candidate based on an assessment of the candidate's work and conduct during their last three years of service (thus through a quite limited time period). The assessment was meant to be carried out by a board composed of the president of the court of appeal concerned and four members of that court who have the specializations corresponding to the sections within which there are

in individuals (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C 487/19, EU:C:2021:798, paragraph 110 and the case-law cited)." - Joined Cases C 748/19 to C 754/19, paragraph 69.

25 See also paragraphs 81-82 of the Joined Cases C 748/19 to C 754/19.

26 "It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgment of 6 October 2021, W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), C 487/19, EU:C:2021:798, paragraph 109 and the case-law cited)." - Joined Cases C 748/19 to C 754/19, paragraph 67.

27 "Such a power cannot be considered compatible with the obligation to comply with the requirement of independence, in accordance with the case-law referred to in paragraph 73 of this judgment" - Joined Cases C 748/19 to C 754/19, paragraph 87.

28 "the referring court asks, in essence, whether the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 TEU and Article 47 of the Charter, is to be interpreted as meaning that a piece of national legislation relating to the scheme for the promotion of judges is required to ensure compliance with the principle of the independence of judges." - Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 57.

vacant posts to be filled by the selection procedure. Those members were to be appointed upon a proposal from the college of the court of appeal concerned.

As pointed out by the referring court, the new procedure has caused doubts as it was considered as moving away from the principle of merit-based promotion and was instead relying on discretionary and subjective assessments. In addition, by conferring greater power to the presidents of the courts of appeal, the new procedure allegedly had the effect of encouraging attitudes of hierarchical subordination towards the members of the higher courts who would be called to assess the work of judges who are candidates for promotion[29]. As a result, the applicants were concerned that the independence of judges applying for a promotion would be impaired, as they would aim to satisfy the preferences of their superiors, who would later on decide on their promotion. The criteria of the promotion, which could be perceived as quite subjective and vague, would not exclude such risk.

The case offered the ECJ an opportunity to speak on an interesting aspect of the judicial independence, as this time the doubts did not concern influence of the legislative or executive branches, but the influence exercised by the other members of the judiciary. The ECJ ruled that in general the fact that certain judges exercise control over the professional activity of their peers is not on its own indicative of a potential problem regarding the independence of judges[30]. It did not seem that this approach was affected by the fact that the concerns presented in the case were brought up by an association of judges. Similarly to the Land Hessen case, the ECJ pointed out that no proof of influence over judges had been presented[31], seemingly indicating that solely the hypothetical risk of abuse (which has been explained in detail by the referring court) would not suffice to establish an infringement of the judicial independence. Additionally, the ECJ consistently referred to the social perception test[32],

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29 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 36.

30 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 77.

31 "Indeed, it would also be necessary to establish that that concentration of power, taken in isolation or combined with other factors, is liable to offer, in practice, the persons on whom it is conferred the ability to influence the decisions of the judges concerned, and thus create a lack of independence or an appearance of partiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals. However, the file before the Court does not contain any material capable of establishing that such a potential concentration of power could, in itself, confer, in practice, such an ability to influence; nor does it point to any other factor which could, combined with that concentration of power, produce effects which would be such as to give rise to doubts, in the minds of individuals, as to the independence of the judges who have been promoted." - Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 80-81.

32 "The guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality

citing it six times in the judgment[33]. The concluding remarks indicated, however, that in the ECJ's view the standards of the judicial independence had been upheld.[34]

3 THE SOCIAL PERCEPTION OF JUDICIAL INDEPENDENCE TEST: EVALUATION

The presented cases diverge in many aspects: starting from the required standard of proof of influence exercised over judges and moving on to whether doubts of judges themselves are a strong indicator of infringement of judicial independence standards[35]. However, a recurring theme of judicial independence assessment in the case law of ECJ – seemingly overriding other applicable judicial independence tests – is the social perception test[36], which aims to verify whether the rules are such as to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of the assessed body to external factors and its neutrality with respect

with respect to the interests before it (judgment of 29 March 2022, Getin Noble Bank, C 132/20, EU:C:2022:235, paragraph 95 and the case-law cited). In that regard, it is necessary that judges be protected from external intervention or pressure liable to jeopardise their independence and impartiality. The rules applicable to the status of judges and the performance of their judicial duties must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned, and thus preclude a lack of appearance of independence or impartiality on their part likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals (judgment of 29 March 2022, Getin Noble Bank, C 132/20, EU:C:2022:235, paragraph 96 and the case-law cited). […] It is therefore necessary that the substantive conditions and procedural rules governing the adoption of decisions to promote judges are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been promoted (see, by analogy, judgment of 29 March 2022, Getin Noble Bank, C 132/20, EU:C:2022:235, paragraph 97 and the case-law cited)." - Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 63-64 and 66.

33 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 63, 66, 71, 81, 89 and in the Operative part of the judgment.

34 Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraph 88.

35 See: "The ECJ also puts an emphasis on individual judges' self-perceived independence – for instance, a judge fearing that their secondment to a higher court might be terminated at any time by the minister of justice, at the minister's will, is prone to developing the idea that they need, in their judicial office, to act in such a manner as to live up to the minister's (presumed) expectations (PR w Mińsku Mazowieckim" - Mańko Rafał, EPRS (European Parliamentary Research Service), *ECJ case law on judicial independence. A chronological overview*, 2023, page 11, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf], Accessed 15 April 2024; vs the approach presented by the ECJ in Case C 272/19 VQ v Land Hessen and Case C-216/21, Asociația "Forumul Judecătorilor din România".

36 "The ECJ's approach to judicial independence as a binding standard of EU law is based on a social perception test […]" – Mańko Rafał, EPRS (European Parliamentary Research Service), ECJ case law on judicial independence. A chronological overview, 2023, page 11, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf], Accessed 15 April 2024.

to the interests before it.[37] The social perception test seems to represent the current binding standard promoted by the ECJ. This approach, however, while undoubtedly offering a lot of flexibility, also causes significant ambiguities and does not seem to define the judicial independence any better than the approximate definition which had already been offered by the international guidelines.

Firstly, with the proposed approach the ECJ assumes that the impartiality and independence of judges is dependent on a subjective impression.[38] A well-organized misinformation campaign could easily manipulate such standard to ensure a positive feedback for legislative changes which, in the long run, could effectively disable the judiciary. Conversely, a similar campaign could mistakenly create negative reception of valid changes in judicial organization. Not to mention that the social perception test does not prevent in any way an action consisting of numerous minor legislative changes stretched over an extended period of time, which could easily avoid any public scrutiny whatsoever.

Secondly, the case law does not provide an example of model individuals, whose doubts surrounding the imperviousness of the assessed body to external factors and its neutrality could indeed indicate lack of judicial independence. It seems that the individuals must be citizens and not judges, as the doubts raised by the Romanian judicial association in Asociația "Forumul Judecătorilor din România" case and by the German court in Land Hessen case have not been sufficient as to imply a lack of independence. A very clear example of how this approach could prove problematic if the social perception test was to be broadly considered a binding standard would be the case of Poland. A Polish public opinion polling institute (Fundacja Centrum Badania Opinii Społecznej (CBOS) - Centre for Public Opinion Research) has conducted cyclical studies on the public perception of judicial independence by the Poles. The poll results from the years of 2012, 2017 and 2022 have remained almost identical, as the public's responses to the question: "In your opinion, are judges in Poland independent when pronouncing judgements, i.e. are they not subject to any external pressure?" have been (respectively for 2012, 2017 and 2022) affirmative in case of 22%, 24% and 17 % of respondents, negative in case of 22%, 23% and 20% of the respondents and

[37] See e.g.: Case C-216/21, Asociația "Forumul Judecătorilor din România", paragraphs 63, 66, 71, 81, 89 and in the Operative part of the judgment; Joined Cases C 748/19 to C 754/19, paragraph 67; Case C 272/19, VQ v Land Hessen, paragraph 52; Case C-274/14, Banco de Santander, C-274/14, EU:C:2020:17, paragraph 63; Case C-222/13, TDC, EU:C:2014:2265, paragraph 32; Case C-506/04, Wilson, EU:C:2006:587, paragraph 53.

[38] Similarly: Mańko Rafał, EPRS (European Parliamentary Research Service), *ECJ case law on judicial independence. A chronological overview*, 2023, p. 11, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf], Accessed 15 April 2024.

ambiguous ("sometimes the judges are independent, sometimes they are not") in case of 44%, 38% and 49% of the respondents[39]. While a slight decline in affirmative opinions can be noticed, it is also accompanied by a slight decline of negative opinions, which (especially considering the very public and long lasting rule of law debate between the EU and the Polish government) seems to prove that average citizens are not much invested in the rule of law and judicial independence debates. Moreover, in another poll where the respondents were asked about their opinion as to the judicial reforms introduced by the Polish government the groups of supporters, opposers and the Poles partly supporting and partly opposing the reforms were almost equal (respectively 30%, 31% and 30% of the respondents).[40]

In light of the above, it seems that the social perception test introduced by the ECJ risks leaving the ECJ itself with no specific guidance as to the content and prerequisites of judicial independence.

What remains then? The contextualization of the jurisprudence seems to be the main and approved approach of both the ECJ and AGs. In one of the most commented, analyzed and criticized[41] cases of the ECJ connected with the rule of law backsliding debate – that is the Getin Noble Bank S. A. Case[42], a quite straightforward admission has been made. As stated by the AG Bobek in his opinion: "Given the variety of situations in which an issue of independence of the judiciary could be raised, it is impossible to say *a priori* which type of elements should carry more weight. The significance of those elements – which, I repeat, must in any event be assessed together – depends obviously on the specific characteristics of the case in question. Moreover, the overall context in which the rules operate and how they relate or interact with other rules and actors is equally important. (In)dependence is by definition relational: it is the independence from or the dependence on something or somebody. Thus, metaphorically speaking, its assessment cannot be limited to a microscopic study of one slice of a salami, without having regard to the rest of the salami stick, how and where it is normally stored, its distance and relation to other objects in the storage room, and while nonchalantly ignoring the fact that there is a rather large carnivore lurking in the corner of the room. Second, and perhaps even more importantly, it is simply impossible to lay down ex ante

[39] Komunikat z Badań CBOS Nr 95/2022, "Społeczne oceny wymiaru sprawiedliwości", ISSN 2353-5822, p. 8, available at:
[https://www.cbos.pl/SPISKOM.POL/2022/K_095_22.PDF], Accessed 15 April 2024.

[40] Komunikat z Badań CBOS Nr 22/2020, "Polacy o zmianach w sądownictwie", ISSN 2353-5822, p. 6, [https://www.cbos.pl/SPISKOM.POL/2020/K_022_20.PDF], Accessed 15 April 2024.

[41] Although it seems that the analysis angle was mostly focused on the "court or tribunal" test under the EU law.

[42] Case C-132/20 BN and Others v Getin Noble Bank S.A.

a universally valid test for assessing judicial independence irrespective of the EU provision that is applicable in the case at hand. To attempt to state conclusively, in the abstract, when exactly a certain court will be 'independent', without knowing either the purpose for which the question is formulated – that is to say whether it is in the context of Article 267 TFEU, Article 47 of the Charter, or Article 19(1) TEU – or the circumstances of an individual case, comes rather close to asking the Court to put the proverbial cart before the horse."[43]

While the AG's statement clarifies well the growing impact of contexts and social perceptions in the recent judicial independence case law of the ECJ, his acceptance and recommendation for a full contextualization of the judicial independence test seem to – quite unapologetically – close the door to any other possible solution or future change of course, while expressing little to no criticism towards such arbitrary approach.

4. SUMMARY AND CONCLUDING REMARKS

In light of the analysis above, one has to consider whether and to what extent the ECJ's opinions on the standards of test for judicial independence diverge on a case by case basis. It appears that no uniform standard has been created and no such standard is in the works. The open admission of AG Bobek as to the need of contextualization of the judicial independence and the impossibility of creation of a universally valid test leaves no guidance and could be taken as a confirmation of certain degree of arbitrariness of the ECJ's rulings. Furthermore, such approach also puts in question if e.g. the rulings concerning rule of law backsliding in Poland would bring an opposite result had the package of reforms been split over an extended period of time or if the political rift between Poland and the EU did not become so evident.

The position of the ECJ could prove gravely insufficient in the days to come. By inferring that similar circumstances can be judged differently depending on the context that surrounds them the ECJ, instead of setting forth a reliable standard of judicial independence, seems to have created the conditions for a future decline of the rule of law which may go undetected as long as it advances gradually and its promotors abstain from too open anti-EU declarations. A hazardous approach in times of rule of law backsliding.

[43] Case C-132/20, BN and Others v Getin Noble Bank S.A., Opinion of AG Bobek, paragraphs 99-101.

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