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Judicial Independence – The CJEU’s view

Thorsten Bausch (Hoffmann Eitle) · Tuesday, March 20th, 2018

I know that this is a patent blog. But something – I don’t know what, maybe it’s the upcoming meeting of the EPO’s Administrative Council – drives me to refer very briefly to a new CJEU ruling. Here is what the Court of Justice had to say about judicial independence in Case [C-64/16](#). Emphases in bold are mine.

Article 2 TEU reads as follows:

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. 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.’

Article 19(1) and (2) TEU provides:

‘1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. ...

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt ...’

40 Consequently, to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a ‘court or tribunal’, within the meaning referred to in paragraph 38 above, on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU.

41 In order for that protection to be ensured, maintaining such a court or tribunal’s independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy.

42 The guarantee of independence, which is inherent in the task of adjudication (see, to that effect, judgments of 19 September 2006, *Wilson*, C 506/04, EU:C:2006:587, paragraph 49; of 14 June 2017, *Online Games and Others*, C 685/15, EU:C:2017:452, paragraph 60; and of 13 December 2017, *El Hassani*, C 403/16, EU:C:2017:960, paragraph 40), is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.

43 The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

44 **The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions** (see, to that effect, judgments of 19 September 2006, *Wilson*, C 506/04, EU:C:2006:587, paragraph 51, and of 16 February 2017, *Margarit Panicello*, C 503/15, EU:C:2017:126, paragraph 37 and the case-law cited).

45 Like **the protection against removal from office of the members of the body concerned** (see, in particular, judgment of 19 September 2006, *Wilson*, C 506/04, EU:C:2006:587, paragraph 51), the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out **constitutes a guarantee essential to judicial independence**.

Maybe the Administrative Council would like to re-consider its previous decision not to re-appoint Mr. Corcoran in the spirit of both [the ILOAT's verdict](#) and this decision that rightly emphasizes the importance of judicial independence. According to the CJEU, this judicial independence compellingly requires the autonomy of the body exercising a judicial function (e.g. a Board of Appeal) and the protection of its members against removal from office.

There is simply no way to sidestep the requirements of Art. 23(1) EPC, as the EPO Management and the AC did in this case. And if the Administrative Council does not want to acknowledge this, it will sooner or later reap the fruits it has sown.

Just saying...

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