The Incitement. An unbiased review

Introduction

What's a fair trial? The requirement for fairness under judicial proceedings was originally based on the concept of natural justice. However, as time went on, it became a legal standard of modern justice incorporated in all modern legislations and especially covered by the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. In this respect, the European Court of Human Rights and the Court of Justice of the European Union developed an extensive and complex jurisprudence concerning a wide range of topics influencing the meaning of a fair trial.

While the requirements of a fair trial imply distinct guarantees, they are all guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers . Under this paper we intend to offer an extensive approach of fair trial concept from having as landmark the legal question submitted.

1. The police incitement

The activity of Miss G as an informant of the police meets the criteria established in ECtHR jurisprudence. The Court has defined entrapment as a situation where the officers involved do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is to provide evidence and institute a prosecution[1]. Only after Miss G repeated offers, Frank K agreed to meet the dock worker, a police agent himself. Also, Franz K felt under pressure and obliged by the informant to build up contacts with persons capable of organizing drugs abroad. Regarding the fact that Franz K was informed of the suspicions against him without being provided with a legal assistance, ECtHR pointed out that immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the lack of appropriate information on rights[2]. From this perspective, the access to a lawyer implies physical presence of the lawyer at the initial police interview and any further questioning during the pre-trial proceedings[3]. Also, it should be noted that the restriction on access to a lawyer caused a relevant prejudice for the defendant. Not being properly advised led to Frank K, in the end, to be tried *in absentia.* Not being aware of his rights, he was not able to assess the stage of the proceedings and the consequences of leaving the country, facts that caused him to be tried in absentia.

2. The importance of the quality of interpretation in the court proceedings

In October 2010, the European Parliament and the Council adopted Directive 2010/64/EU[4], seen as the first endeavour to guarantee in the EU minimum standards for language services in criminal proceedings[5]. The

[1] EctHR, Ramanauskas v. Lithuania, No. 74420/01, 5 February 2008, para 55.
[2] EctHR, Beuze v. Belgia, No. 71409/10, 9 November 2018, para.125-130
[3] EctHR, Beuze v. Belgia, para.133-134
[4] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7.
[5] Magdalena Kotzurek, *Directive 2010/64/EU on translation and interpretation services in criminal proceedings: A new quality seal or a missed opportunity?*, available at https://eucrim.eu/articles/directive-201064eu-on-translation-and-interpretation-services-in-criminal-proceedings-a-new-quality-seal-or-a-missed-opportunity/.

Directive overtly addressed for the first time the issue of the quality of translation and interpretation services in criminal proceedings[6].

The standards from this directive are strengthened by Directive 2012/13/EU[7], especially by Article 4 entitled 'Letter of Rights on arrest'[8] and Article 6, entitled 'Right to information about the accusation'[9].

As CJEU stated in the IS10 case, the obligation of the Member States referred to in Article 5(1) of Directive 2010/64, read in conjunction with, inter alia, Article 2(8) is firm, clear and unconditional in the sense that they need to take 'concrete measures' to ensure that the interpretation provided is of a 'sufficient quality', in particular in the absence of a register of independent translators or interpreters.

The above-mentioned case concerned a Hungarian criminal proceeding against a Swedish national which has been suspended by Judge Vasvári of the Pest Central District Court. The judge referred to the CJEU for three questions, one related to the quality of translations and interpretations in criminal proceedings, and two in connection with judicial independence. The compliance with the requirements relating to a fair trial means ensuring that the accused person knows what is being alleged against him or her and can defend himself or herself[11]. The obligation of the competent authorities is not, therefore, restricted to the appointment of an interpreter. If they are put on notice in the particular circumstances, it may also extend to a degree of subsequent control over the adequacy of the interpretation provided. Failure on the part of the national courts to examine allegations that an interpreter provides inadequate services may entail an infringement of the rights of the defence. The Court quote in this respect, giving effect of the article 52 (2) CFR that stipulates that ECHR is the minimum standard for interpreting human rights, the judgement of ECtHR in Knox v. Italy[12].

All in all, CJEU clearly stated that EU law requires Member States to take concrete measures to ensure that the quality of the interpretation and translations in criminal processes is of such a quality that fair trials are guaranteed, in particular that suspects can understand the accusation against them and that they are able to exercise their right of defence. Should the national court not be able to analyse whether the person concerned was informed of the accusation in a language they comprehend, either because the interpretation was inadequate or because its quality cannot be established and evaluate, this precludes the suspect from being tried in absentia.

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[6] According to the preamble of the directive: „(26) When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointe interpreter". Article 5 of the directive, entitled „Quality of the interpretation and translation" provides: „1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9). 2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevan authorities. 3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive."

[7] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

[8] '1. Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty. 5. Member States shall ensure that suspects or accused persons receive the Letter of Rights writte in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.'

[9] '1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person".

[10] CJEU, judgement of 23 November 2021, IS, C-564/19, EU:C:2021:949, p. 112.

[11] CJEU, judgment of 15 October 2015, Covaci, C-216/14, EU:C:2015:686, paragraph 39.

[12] ECtHR, judgement 24 June 2019, Knox v. Italy, CE:ECHR:2019:0124JUD007657713, §§ 182 and 186.

The Court took into consideration the non-disputed fact that there was no register of independent translators or interpreters in Hungary.

Appling these principles to the present case, judge Arno V. should have sufficient information regarding the interpretation of the Article 5(2) of Directive 2010/64 and Article 4(5) and Article 6(1) of Directive 2012/13. In that regard, it was an act eclairé[13].

In this respect, Franz K was informed of the suspicions against him without being provided with a legal assistance (the lawyer was unable to attend), ECtHR pointed out that immediate access to a lawyer able to provide information about procedural rights is likely to prevent unfairness arising from the lack of appropriate information on rights. From this perspective, the access to a lawyer implies physical presence of the lawyer at the initial police interview and any further questioning during the pre-trial proceedings.

Also, it should be noted that the restriction on access to a lawyer caused a relevant prejudice for the defendant. Not being properly advised led to Frank K, in the end, to be tried in absentia. Not being aware of his rights, he was not able to assess the stage of the proceedings and the consequences of leaving the country, facts that caused him to be tried in absentia.

3. The power if the Prosecutor General to submit the extraordinary appeal against a decision requesting the preliminary ruling of CJEU

a. ECHR standard. The existence of an extraordinary appeal which is available only for the Prosecutor General and not for the other parties in a case infringes the principle of equality of arms.

Also, it is worth noting the fact that the extraordinary appeal can be filed against any court decision, which may include one which has become 'final'. The right of access to a court includes both the right to legal certainty and the right to effective court decisions. In a number of cases, the ECtHR has held that such extraordinary appeals infringe the principle of res judicata in both civil and criminal proceedings and amount to a violation of Article 6(1)[14].

b. The EU law standard

In a judgment delivered by Grand Chamber on 23 November 2021, in the case C-564/19[15], the CJEU ruled that Article 267 TFEU must be interpreted as precluding the supreme court of a MS from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted to the Court under Article 267 TFEU by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings. A decision rendered following an appeal in the interest of the law is likely to prompt all national courts to refrain from referring

[13] CJEU, CILFIT and Consortio Italian Management cases.

[14] For example, in the well-known case of Brumărescu v. Romania, par. 82 the Court held that allowing the Procurator-General of Romania to file an appeal against a final judgment to be violated the principle of legal certainty . The right to a fair trial before a court should be interpreted in the light of the Preamble to the ECHR, which gives credit of the states the pre-eminence of rights as an element of the common traditions of the signatory states. Among these, the principle of security of legal relations lies at the very basis of this fundament and requires that the final solution to any litigation by court should not be reconsidered. Otherwise, the very existence of the court becomes debateable. Observing res judicata authority implies the obligation for signatory states to strive to identify related judicial procedures and prohibit re-opening new judicial procedures regarding the same issue.

[15] CJEU, judgement of 23 November 2021, IS, C-564/19, EU:C:2021:949.

questions for a preliminary ruling to the Court, in order to preclude their requests for a preliminary ruling from being challenged by one of the parties on the basis of disregarding the decision given in the appeal in the interests of the law.

In that decision, the Court reminded that it held that, by virtue of the principle of the primacy of EU law, a Member State's reliance on rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of EU law. In accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, inter alia, provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, being able to prevent that.

The CJEU emphasised the paramount importance for the EU legal order of the preliminary ruling procedure. The Court also clarified that deciding on the preliminary ruling question as being unlawful falls within the exclusive competence of the Court of Justice itself. That is an utterly powerful indication for the national courts that are not the first in their internal hierarchy. When their margin of appreciation regarding the necessity of the referral to the CJEU is undermined, the principle of the primacy of EU law requires that lower court to disregard such a decision of the national superior court[16] and proceed with the adjudication of the case[17] (paragraph 81).

The same principle should be applied mutatis mutandi with an extraordinary appeal filed against a certain decision ordering a reference for a preliminary ruling.

4. The institution of secondment of judges by the Minister of Justice

According to the national laws of Kingdom of H, the Minister of Justice may second a judge to a higher court "for a specified period of up to 2 years, or for an unspecified period. The secondment of a judge may be terminated by the Minister of Justice of any time and the decision does not need any reasoning and there is no appeal against it. In our opinion, such provisions are incompatible with the right to a fair trial.

In a judgment delivered by the Grand Chamber on 16 November 2021 In Joined Cases C-748/19 to C-754/1918, the CJEU ruled that the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by

[16] CJEU, Judgement from 18 mai 2021, Asociația "Forumul Judecătorilor din România" and Others, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19. There is also a pending case with the same legal problem – C-430/21, RS, lodged on 14 July 2021.

[17] In legal doctrine it is said that this is „disproportionately underdeveloped considering the immense pressures that had already been placed on the referring judge as evidenced by this case: namely, a declaration of unlawfulness by the Hungarian Supreme Court (Kúria) of the request for preliminary ruling and the launch of disciplinary proceedings against the judge for referring a preliminary request (paragraphs 39-50). Thus, its effectiveness remains questionable". See Petra Gyöngyi, *IS (Illegality of the order for reference) (C-564/19): A ground-breaking judgment but an uncertain outcome on the ground*, at https://eulawlive.com/op-ed-is-illegality-of-the-order-for-reference-c-564-19-a-ground-breaking-judgment-but-an-uncertain-outcome-on-the-ground-by-petra-gyongyi/ .

[18] CJEU, WB and others v. Poland, Judgment of 16 November 2021, in joined cases C-748/19 and C-754/19, para. 59-90

way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

The CJEU took into consideration the fact that the Minister for Justice had the power to terminate such secondments at any time, without the criteria that may be associated with that power being known and without the reasons for such a decision being stated. The possibility available to the Minister for Justice to terminate the secondment of a judge at any time, in particular in the case of a secondment to a higher court, could give an individual the impression that the assessment to be carried out by the seconded judge who is to hear and determine his or her case will be influenced by the fear of termination of the secondment.

Furthermore, that possibility to terminate the secondment of a judge at any time and without any publicly known reason could also give the seconded judge the feeling of having to meet the expectations of the Minister for Justice, which could give rise to the impression on the part of the judges themselves that they are 'subordinate' to the Minister for Justice, in a manner incompatible with the principle of the irremovability of judges. In the case brought in front of the CJEU (similarly to our given legal case), the Minister for Justice was also the Public Prosecutor General. His arbitrary power to second judges to higher courts and to terminate their secondment, at any time and without being required to give reasons for that decision was considered by the CJEU as incompatible with the independence of the judges. The EUCJ court also critised that provision according to which the Minister for Justice may terminate the secondment of a judge irrespective of whether that secondment is for a fixed or indefinite period. It was also argued that during the period of the secondment, judges are not provided with the guarantees and the independence which all judges should normally enjoy in a State governed by the rule of law. The presumption of innocence, presupposes that the judge is free of any bias and any prejudice when examining the criminal liability of the accused. The independence and impartiality of judges are therefore essential conditions for guaranteeing the presumption of innocence.

5. The position of the Presidents of courts

The first president was accused of "inactivity in its authorities in preventing the unlawful actions by some rebellious judges who are undermining the fundamental principles of the domestic legal system and in his place was appointed a judge from an inferior court, by the Minister of Justice, a member of the executive who also holds the office of General Prosecutor.

Judge Jana G, the newly appointed President of the Themisburg Regional Court ordered judge Arno V to withdraw the request for the preliminary ruling. The office of President of the court does not entitle its holder to order a judge to change his decisions. The independence of the judge requires that he/she should be free from undue influence outside the judiciary, as well as from within. Judges should be protected against orders or pressures against their administrative superiors, such as the president of the court. The absence of sufficient safeguards securing the independence of judges within the judiciary and, especially with relation to their

judicial superiors, have lead the ECtHR to conclude that an applicant's doubts as to the independence and impartiality of a court can be said to have been objectively justified19

Also, the Presidents of courts should not use their administrative power as a means of pressure against the judges. In the given legal case, the President informed the High Justice Inspector about judge Arno V.'s refusal to withdraw his request, which resulted in the commencement of another disciplinary proceeding against judge Arno V.

Moreover, the President of the court suspended judge Arno V. for one month in the basis of a law which foresees the suspension for up to one month in extraordinary circumstances for irreversibly damaging the image of the judiciary. With regard to the legislation, it should be noted that, by an Order of the Vice-President of the CJEU20 of 14 July 2021, Poland was urged to to suspend the provisions of its national law which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law, within the meaning of Article 19(1) TEU in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union.

The President of the court arbitrarily changed the composition of the bench in the criminal case against Franz K., by personally assigning judge Gregory B. (who not only lacks the experience in criminal matters, but also did not agree to his transfer on criminal chamber of the court) , which runs the risk of violating the defendant's right to a fair trial. The President of the Regional Court has no competence to demand from the CJEU to return the request for the preliminary rulling issued by judge Arno V. By this action, the President of the court substitutes herself to the judge who ordered the request the preliminary rulling, the only person who has the competence to withdraw the request, despite of the fact that she had no connection with the case and cannot appreciate whether the problem which formed the object of the request for preliminary ruling is relevant enough.

6. The disciplinary proceedings against a judge for requesting the preliminary ruling

In the given legal case, disciplinary proceedings against judge Arno V. were initiated after he ordered a reference of for a preliminary ruling to the Court of Justice on the compatibility of the national legal system with EU standards, which was interpreted as a method of undermining the fundamental principles of the domestic legal system.

In a judgment[21] the CJEU ruled that Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice under that provision. In its reasoning, the CJEU reminded that the provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot be permitted22. Ordering a

[19] ECtHR, *Parlov-Tkalčić v. Croatia*, no. 24810/06, 22 December 2009
[20] CJEU, Order of the Vice-President of the Court of 14 July 2021, C-204/21 R, ECLI:EU:C:2021:593
[21] CJEU, Judgment of the court (grand chamber) 23 November 2021, IS *(Illegality of the order for reference)*, case C-564/19, ECLI:EU:C:2021:949.
[22] *Idem*, par. 90.

reference for a preliminary ruling to the Court is exclusively within the powers of the judge. The fact that judges may not be exposed to disciplinary proceedings for ordering a reference for a preliminary ruling to the Court, which is exclusively within their jurisdiction. This preclusion constitutes a guarantee that is essential to judicial independence[23]. The Court also warned that disciplinary proceedings commenced on the ground that a national judge has decided to make a reference for a preliminary ruling to the Court are liable to deter all national courts from making such references, which could jeopardise the uniform application of EU law24..

A second disciplinary investigation was started against judge Arno V. for refusing to withdraw his request for a preliminary ruling. According to Article 100 par. (1), the Court shall remain seized of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court. Similarly, to how a reference for a preliminary ruling to the Court is exclusively within the powers of the national judge, the withdrawing of the request for a preliminary ruling is a faculty of the judge in the case. Neither the influence of the President of the court, nor the disciplinary proceedings should be exercised as a means of pressure against the judge, in order to have him withdraw his decision.

7. Other problematic issues related to the case

a. The binding interpretations of the legal provisions of the High Court and the preliminary ruling mechanism

The preliminary ruling mechanism established by that provision aims to ensure that, in all circumstances, EU law has the same effect in all Member States and thus to avoid divergences in its interpretation which the national courts and tribunals have to apply and tends to ensure that application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving EU law its full effect within the framework of the judicial systems of the Member States.

The issue emerging from the relation of the binding interpretations of the legal provisions of the High Court and the relevant Directive of EU law and that, if they are not compatible, a national court may not continue the criminal proceedings was also the problem in the case Consorzio Italian Management[25].

The Luxemburg court also stated that a court or tribunal cannot be relieved of that obligation merely because it has already made a reference to the Court for a preliminary ruling in the same national proceedings.

Whether Article 6(1) of Directive 93/13 must be interpreted as precluding national case-law was also the issue arrising in Joined Cases C-154/15, C-307/15 and C-308/15[26], where the ECJ stated that article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court, in accordance with Article 3(1) of that directive, in respect of a clause contained in a contract concluded between a consumer and a seller or supplier, to amounts overpaid under such a clause after the delivery of the decision in which the finding of unfairness is made.

[23] *Idem*, par. 91.
[24] *Idem*, par. 92.
[25] CJEU, JUDGMENT OF THE COURT (Grand Chamber) 6 October 2021, Case C-561/19, ECLI:EU:C:2021:799;
[26] CJEU, JUDGMENT OF THE COURT (Grand Chamber) 21 December 2016, Joined Cases C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980.

Consequently, applying the principles stated above to the present case, regardless if the law of the member states entitles the High Court or Constitutional Court[27] to give binding interpretations on legal provisions that seems to be unclear, the national judge has the possibility to refer to the preliminary question to the CJEU on the compatibility of the domestic legal system in this regard with the EU standards.

Given that the preliminary ruling procedure offers a far-reaching guarantee that Community law will remain uniform in all Member States, the two procedures (the binding interepretation give by the High Court of Themisburg and the preliminary question to the CJEU) can not exclude each other, but coexist and where a conflict arises between an aspect of EU law and an aspect of law in an EU country (national law), EU law will prevail, given the principle of the primacy[28].

If the binding interpretation of the legal provision given by the Hight Court is sufficient and judge Arno V. does not have to refer the preliminary question to the CJEU, the principle of the primacy of EU law would be violated and the sense and purpose of the preliminary ruling procedure would totally fail, being unable to prevent national case-law and judicial practice that are not in accordance with the rules of Union law from being established in a Member State.

In conclusion, even if the High Court was entitled to give a binding interpreation of the legal provisions if judge Arno referred to the Court, this does not mean that the possibility to refer the preliminary problem in question to the CJEU does not subsits anymore. Furthermore, in the present case the judge did not use the oportunity to request a binding interpretation of the legal provisions from the High Court, so there isn't any conflict between the interpretion of the High Court in Themisburg and the interpretation that CJEU will be giving.

The composition of the High Court of Themisburg

Article 47[29] of the CFR applies to all rights and freedoms arising from EU law and it corresponds to the rights in article 6(1) of the ECHR, without article 6's limitation on civil rights and obligations, therefore securing, as a minimum, the protection offered by article 6 of the ECHR in respect to all rights and freedoms arising from EU law[30], noting however, that the EU Charter of Fundamental Rights applies domestically only when Member States are implementing, or derogating from EU law[31], as confirmed by Article 52 (3) of the Charter. This means that EctHR case law is relevant for interpreting Charter rights where these rights correspond. To qualify as a tribunal[32] for this purpose, the body referring a case to the CJUE must: be estabilised

[27] A case regarding if the principle of the independece of the judiciary precludes a provision of national law contained in the Romanian Constitution, as interpreted by the Constitutional Court of Romania according to which national courts have no jurisdiction to examine the conformity with EU law of a provision of national law that has been found to be constitutional by a decision of the Constitutional Court is now pending before the Court.
Case C-430/21

[28] Flaminio Costa v. E.N.E.L, Judgment Of 15.7.1964 — CASE 6/64.

[29] Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

[30] CJEU, C-199/11, Europese Gemeenschap v. Otis NV and others, 6 november 2012, para 47.

[31] CJEU, C-370/12, Thomas Pringle v. Government of Ireland, Ireland and the Attorney General, 27 November 2012, para. 178-182.

[32] The case law on Article 6 of the ECHR provides detailed rules about the independence of the judiciary, which are designed to protect it from external pressures and guarantee neutrality. These rules cover the manner of appointing tribunal members, the duration of their terms of office, and the existence of guarantees against outside pressure[32].

by law, be permanent[33], be independent and impartial, include an inter-partes procedure, have compulsory jurisdiction, apply rules of law[34]. Judges may be appointed by the executive, but the law must ensure that they do not receive instructions on how to exercise their duties[35]. The final, binding and enforceable judgments of a court should not be interfered with[36].The ECJ recalls that, as regards the rules[37] governing the disciplinary regime applicable to judges, the requirement of independence derived from EU law means that, in accordance with settled case-law, that regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. The Court stated[38] that Poland has, in the first place, failed to guarantee the independence and impartiality of the Disciplinary Chamber and has thereby undermined the independence of judges by failing to ensure that disciplinary proceedings brought against them will be reviewed by a body offering such guarantees.The independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects (judgment of 9 July 2020, Land Hessen, C-272/19, EU:C:2020:535, paragraph 45). It is, thus, essential to the proper working of the judicial-cooperation system embodied by the preliminary-ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (see, inter alia, judgment of 21 January 2020, Banco de Santander, C-274/14, EU:C:2020:17, paragraph 56 and the case-law cited). Furthermore, the requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial as provided for by Article 47 of the Charter, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded (see, to that effect, judgments of 26 March 2020, Review Simpson v Council and HG v Commission, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraphs 70 and 71, and of 2 March 2021, A.B. and Others(Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 116).

In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must in particular be ensured in relation to the legislature and the executive[39]. In Repubblika v Il-Prim Ministru[40], The Court stated that Article 19(1) TEU must be interpreted as not precluding national provisions which confer on the Prime Minister of the Member State concerned a

[33] Under CoE law, a tribunal is characterised by its judicial function. It does not have to be a court of the "classic kind"[33]. A tribunal can be a body set up to determine a limited number of specific issues (for example, compensation), provided it offers the appropriate guarantees[33].
[34] CJUE, C-54/96, Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH. 17 september 1997, para 23.
[35] ECtHR, *Beaumartin v. France*, No. 15287/89, 24 November 1994, para. 38.
[36] ECtHR, *DRAFT - OVA a.s. v. Slovakia*, No. 72493/10, 9 June 2015, paras. 80–86.
[37] Rules which define, in particular, both forms of conduct amounting to disciplinary offences and the penalties actually applicable, provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 CFREU, and lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions, constitute a set of guarantees that are essential for safeguarding the independence of the judiciary.
[38] CJEU, Commission v Poland, Judgment of 15. 7. 2021 – Case c-791/19.
[39] Judgments of 19 November 2019, A.K. and Others(Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 124 and of 2 March 2021, A.B. and Others(Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 118
[40] Judgment of the Court (Grand Chamber) 20 April 2021, Case C-896/19, paragraph 73.

decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible for, inter alia, assessing candidates for judicial office and giving an opinion to that Prime Minister. Taking into consideration the above mentioned decisions, as judge Arno pointed out, the process of election for the members of the High Court is a threat to judicial independence and the rule of law, because the legislator elects the members of the Judicial Council, which selects the judges for the High Court. Given the fact that the Parliament not only appoints members of the Judicial Council, but ellects them, such a body could not itself be sufficiently independent of the legislature.

Furthermore, the exercise of the power does not seem to be circumscribed to the requirements of the profesional experience which may be satisfied by the candidates for the High Court, as these criteria are not stated in the given case, apparently the Judicial Council beeing able to select judges based on random criterias, having a large margin of apreciation and violating the principle of the independence of the judiciary as stated in The Bangalore Principles on judicial conduct[41].

Plurality of offices

As General advocate Bobek stated[42], the member of the government wears 'a double hat', Mr. Lichttrager being both the minister of Justice and the General Prosecutor, this being a very disturbing feature of the national legal framework. This produces an 'unholy' alliance between two institutional bodies which, normally, should function separately. As regards, in particular, the issue of secondment of judges, in effect it allows the hierarchical superior of one party to criminal proceedings (the prosecutor) to compose (part of) the panel which will hear the cases brought by his or her subordinate prosecutors.

Consequently, that some judges may have an incentive to rule in favour of the prosecutor or, more generally, in favour of the Minister for Justice/General Prosecutor and also judges of lower courts may be tempted by the possibility of being rewarded with a secondment to a higher court, with possibly improved career prospects and a higher salary. In turn, seconded judges may be discouraged from acting independently, in order to avoid the risk that their secondment may be terminated by the Minister for Justice/General Prosecutor. Thus, being both the minister of Justice and the General Prescutor affects the independence value.

Conclusion

While the purpose of this paper was to analyze the right of fair trial from numerous perspectives, we intended to cover the most relevant aspects of the submitted legal question in an in depth manner. Without claiming to cover all the issues related to the legal implications of a fair trial, we intended to present a comprehensive and, yet, to the point paper on aspects such as: police incitement, legal assistance and quality of interpretation, independence and impartiality of the judiciary.

[41] Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
[42] OPINION OF ADVOCATE GENERAL BOBEK delivered on 20 May 2021, Joined Cases C-748/19 to C-754/19, ECLI:EU:C:2021:403.