How to Assess the Independence of Member State Courts?

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28.07.2018 doi: 10.17176/20180730-100627-0

Immediately after it was published, the judgment in Case C-216/18 PPU Minister for Justice and Equality v. LM generated many varied assessments in Poland. Some commentators treated the judgment as a general vote of no confidence against the Polish judiciary whilst others (including the Minister of Justice) found it to be a defeat of the Irish court. The judgment is used as an argument in current political disputes. Leaving aside, however, the aforementioned determinants, it is to be concluded that because of its approach to certain significant issues, the judgment does not yield to an unequivocal interpretation, and its actual consequences are still hard to anticipate.

The wish of some participants of political life in Poland for the CJEU to provide a critical assessment of the condition of the rule of law in Poland did not unfortunately come true. Such an expectation did not take account of the specificity of the proceedings and the preliminary ruling. The judgment essentially maintained the standard division of roles between the CJEU providing an interpretation of EU law and giving guidance to the national court, and the national court giving the judgment in the dispute in the main proceedings having regard to this guidance. It is a different matter whether the result of this division of roles in the analysed judgment can prove satisfactory in practice.

The judgment under discussion may be looked at from two perspectives: from a narrower perspective it can be seen as a reply to the question from the Irish court in relation to the specific case pending before it in which an assessment of the current state of the rule of law in Poland is of significant relevance. From a wider perspective it can be seen as a statement provided by the Court on a more general issue of the limits of the obligation to execute the European arrest warrant or even the limits of mutual trust between the courts and the functioning of judicial cooperation.

Current discussions are dominated by the first of these two perspectives, whilst the other one is more relevant for the future of EU law. There is no doubt that the judgment will be of significance for the development of EU case law and the arguments set forth therein may potentially apply in various situations and proceedings. Because of that, some of the findings of the CJEU were formulated in a more general manner. This applies in particular to two major issues, the first being the development and supplementation of the arguments in Case C-64/16Associação Sindical dos Juízes Portugueses, concerning the notion and meaning of independence of national courts in the light of EU law, and the other concerning the setting of the limits of mutual trust and exceptions to the rule of mutual recognition of judgments on account of denial of fundamental rights in the context of executing the EAW and supplementing the judgment in Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru. It is worthwhile to comment, from both of the aforementioned perspectives, on some of the arguments of LM judgment.

A central notion in the judgment is the independence of judges. In the Court's view, the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right 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 (para. 48).

A new argument in the case-law of the CJEU is that if the court executing the warrant finds that there are substantial grounds for believing that the person in

respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, warranted under Article 47.2 of the Charter of Fundamental Rights, (para 73).

An important difference in comparison with the opinion of the AG is the absence, in the judgment, of the strict requirement for a breach of a fundamental right to a fair trial to be "flagrant".

As regards to the notion of independence itself, the CJEU relied on the Associação Sindical judgment, but considerably extended its statements on the factors that build up and warrant the court's independence (para 63-67). This is one of the most important parts of the judgment with relevance going beyond the specific case initiated by the High Court.

The Court maintained, following earlier case law, a distinction of two aspects of independence: external, i.e. freedom from influences, and internal, i.e. impartiality or equal distance from the parties, objectivity and the absence of any interest in the outcome of the proceedings (paras. 63 and 65).

Following the judgment in the Aranyosi case and the opinion of the AG to this judgment, the CJEU spoke in favour of an examination in two steps, by the court executing the warrant, of the prerequisites for an exceptional refraining from the execution of the EAW because of the risk of breach of the court's independence (para 68).

Concerns can be raised relating to each of these steps of the examination. Regarding the existence of an actual risk of denial of the fundamental right to a fair trial, what is the significance of the reasoned proposal of the European Commission opening the proceedings pursuant to Article 7 TEU? From a more general perspective, it is to be noted that such a proposal will not be issued in future in each case of suspicion of the risks discussed; after all, in the history of the Union to date, it has only happened once. In the specific situation in which the Irish High Court is to take the decision, there should be no obstacles to relying on the findings and conclusions of the EC of December 2017. No such obstacle should be formed by that the proposal of the Commission was adopted under a different procedure of a political rather than judicial nature and that the decision of the Council has not yet been issued under Article 7.1 TEU. However, may the national court fully rely on the proposal of the Commission or should it verify or supplement the same? The judgment concerned is not unequivocal in this regard (cf. para. 61, 69, 73, 79).

A conclusion seems justified that the national court may fully rely on the proposal of the EC due to its detailed nature and extensive documentation without the need to gather further evidence for systemic risks but only their updates. It could only be mentioned, as a side note, that during the period of more than half a year since the Commission adopted the proposal under discussion, till July 2018, the condition of systemic breach in Poland worsened significantly as a result of the passing of new statutes on the judiciary, with utter ignorance of reservations from EU institutions and several proceedings opened against Poland.

More doubts arise with regard to the second step of the assessment, i.e. whether in the circumstances of the case, there are serious and proven grounds to conclude that the prosecuted person will be exposed to this risk as a result of the person being surrendered to the Member State issuing the warrant. The doubts concern both procedural and substantive aspects of the Court's proposal. According to the Court, the assessment should be made in "a specific and precise manner". The executing court must request from the issuing court any supplementary information that it considers necessary for assessing whether there is such a risk (para. 76). The issuing court may provide the executing court with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, which may rule out the existence of that risk for the individual concerned (para. 77). The issuing court may seek assistance, if need be, from the central authority or one of the central authorities of the issuing Member State (para. 78).

Despite detailed guidance from the Court (or perhaps: due to them), such a procedure does not seem to be able to lead to a satisfactory result in many or perhaps in most cases. Indeed, one can doubt whether information received from the issuing court and the central authority will be comprehensive and creditable. An additional problem in the concrete perspective on the LM case is that the warrants to surrender the person were addressed to the Irish court by three different Polish courts and the cooperation with them may lead the High Court to ambiguous conclusions.

Doubts may arise also from the substantive aspect of step two of examining the risk of breach of the court's independence. The point herein is to determine whether there are substantial grounds for believing that the surrendered person will run a real risk of breach of his or her fundamental right to an independent court or tribunal and, therefore, of the essence of his or her fundamental right to a fair trial, having regard to his or her personal situation, as well as to the nature of the offence for which he or she is being prosecuted and the factual context that form the basis of the European arrest warrant. (para 75)

What is meant in step two, therefore, are circumstances pertaining directly to the person to be surrendered under a warrant and the act the person is accused of. The guidance of the CJEU concerning the criteria of assessments in this step bring associations with the other element, referred to above, of the notion of independence that is impartiality. Such an approach should be deemed to narrow. With respect to a specific person and the act the person perpetrated, the risk of breaching the independence of the judge may also result from a breach of the external aspect of judicial independence. In the Polish circumstances, these are, amongst others, statements made by the Minister of Justice who is, at the same time, the Prosecutor General and the superior to presidents of courts.

A more general observation comes to mind at this point that there are serious difficulties dividing a general and specific breach of judicial independence, as well as the qualification of particular aspects of independence. This may be illustrated by the issue of potential threat to judicial independence created by the position of presidents of courts in Poland. The president of a court has indirect possibilities to influence judges through forming the adjudicating panels, the possibility to move judges between various departments in courts, or to initiate disciplinary proceedings against judges. The Minister of Justice had, in 2017-2018, for 6 months, the powers to dismiss presidents and vice-presidents of courts and appoint new ones without the observance of any procedure or the need to specify the reasons for the changes. The Minister exercised these powers with regard to ca. 150 persons that is 1/3 of the number of courts. It is hard to conclude clearly whether the state of affairs, as described, poses a risk to judicial independence and if so whether this is an element of systemic risk or whether it may possibly occur in certain cases in the courts where undue exercise of powers by the president is found regardless of when the president was appointed.

In the view of these and other difficulties, a question may arise whether it would not be a better solution to restrict oneself to the test in one step, i.e. examination of the systemic risk of breach of independence of the courts following the formula set in the context of the asylum law in the judgment in Case C-411/10 and C-493/10 N.S. v. Secretary of State for the Home Department. Such a solution would be questionable though. Its consequences could prove too far-reaching and hard to accept due to the zero-one nature of this concept. In Poland's current situation, a general exclusion of all courts from judicial cooperation within the EU would mean unintended but inevitable vote of no confidence against the entirety of Polish judges. However, a prevailing majority of the total of more than 10,000 judges (whilst it is impossible to empirically determine what majority it is) maintain their independence in very difficult conditions, both legal and psychological, which they face in their functioning. This is a dilemma straight from a Greek tragedy!

Finally, an observation comes to mind relating to the extensive reach of the Court's arguments going beyond the framework of the case presented by the Irish Court but being of relevance throughout the scope of judicial cooperation. The independence of

national courts is obviously also required when they refer questions for a preliminary ruling. Such a position was accentuated by the CJEU in its judgment in the Associação Sindical case, and repeated in the judgment discussed here (para. 54). It means that in the case of each reference for a preliminary ruling from Poland (or from another Member State in which there are corresponding doubts as to the respect of the fundamental right to a fair trial) it will be necessary for the Court (rather than courts of Member States anymore) to begin with a full test of independence of a referring court in the manner specified in the LM case. Did the Court realise that the judgment under discussion might have such consequences?

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SUGGESTED CITATION

Biernat, Stanisław: How to Assess the Independence of Member State Courts?, Verfassungsblog, 28.07.2018, doi: 10.17176/20180730-100627-0.

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