

# Proposed Directive to Establish a Statute for Judges of the European Union

## INTRODUCTION

1. The European Union is founded on the essential values of respect for human dignity, human rights, freedom, democracy, equality, legal certainty, justice and the rule of law, which are guaranteed by the Court of Justice of the European Union, in the application and interpretation of the law by member states, through their courts and tribunals. This included providing the necessary means of redress to ensure effective judicial protection in the areas covered by Union Law, in accordance with Articles 2, 4 and 19 of the consolidated Founding Treaty, Article 47 of the Charter of Fundamental Rights, and Article 6 of the European Convention on Human Rights.
2. Independent judges in member states are needed for the preservation and effectiveness of the *area of freedom, security and justice without internal frontiers*, which the European Union offers its citizens under Article 3(2) of the Maastricht Treaty. Under this Treaty, the free movement of persons and the fundamental rights and freedoms of the Charter are guaranteed, subject to the rule of law.
3. Member-state judges are judges of the European Union who uphold effective judicial protection in the areas covered by Union Law, and carry out the required, decentralised application<sup>1</sup> of EU law through prosecution, preliminary rulings before the CJEU, and EU judicial cooperation mechanisms. The very existence of effective judicial control to ensure compliance with Union Law is inherent in a state governed by the rule of law<sup>2</sup>.
4. Unlike CJEU judges, judges of the European Union do not have a common statute that ensures EU law is applied to all citizens.
5. The main sources taken into consideration for a statute for judges of the European Union are the European Union's consolidated Founding Treaty, the Treaty on the Functioning of the EU, the European Convention on Human Rights, the EU Charter of Fundamental Rights, the Statute of the Court of Justice of the EU, and the Magna Carta of Judges (Fundamental Principles) given in Strasbourg, 17 November 2010 CCJE (2010)3 and Opinion Number 3 (2002) of the Conseil Consultatif des Judges Europeens (CCJE), as well as doctrine and case law emanating from the Court of Justice of the EU and the European Court of Human Rights.

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<sup>1</sup> CJEU (Grand Chamber) Judgement of 27/02/2018, Associação Sindical dos Juizes Portugueses v Tribunal de Contas, C-64/16, ECLI: EU: C: 2018: 117, paragraphs 31, 32 and 33.

<sup>2</sup> CJEU (Grand Chamber) Judgement of 28/03/2017, PJSC Rosneft Oil Company v Her Majesty's Treasury, C-72/15, ECLI: EU: C: 2017: 236, paragraph 73 and cited case law.

## I. JUDICIAL INDEPENDENCE

6. The guarantee of independence is inherent in the task of judging and is essential for the proper functioning of the preliminary ruling system provided for under Article 267 TFEU, as only the judicial bodies can promote it<sup>3</sup>. The notion of independence applies to the exercise of judicial functions without being subject to any hierarchical link or subordination in regard to third parties, and without receiving orders or instructions of any kind<sup>4</sup>, including from higher judicial bodies, with judges of the European Union being protected from external interference or pressure when judging or that may influence their decisions<sup>5</sup>.
7. The independence of judges of the European Union - which is inherent in the judicial function - is part of the essential content of the right to effective judicial protection and of the fundamental right to a fair trial. This, in turn, is of paramount importance as a guarantor for the protection of all the rights conferred on individuals under Union Law and for the safeguarding of the common values of the member states proclaimed under Article 2 of the TEU - in particular the value of the rule of law<sup>6</sup>.
8. The independence of judges of the European Union must be guaranteed when exercising their judicial activity, when accessing the office and particularly in terms of the method used to select and enter into a judicial career and function, their development, permanent tenure, functional immunity, training, disciplinary regime, remuneration, dismissal, specific regulation of cases of voluntary and compulsory retirement, and the financing of the judicial system by the member state.
9. The independence of a court within the meaning of the ECHR's Article 6(1), which guarantees the right to a court established by law, is measured by the manner in

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<sup>3</sup> CJEU (Grand Chamber) Judgement of 27/02/2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, C-64/16, ECLI: EU: C: 2018: 117, paragraphs 41 et seq.

<sup>4</sup> Opinion of Advocate General Dámaso Ruiz Jarabo of 28/06/2001, *De Coster v Collège des Bourgmestres et Échevins de Watermael-Boitsfort*, C-17/00, ECLI: EU: C: 2001: 366, paragraphs 92 and 93.

<sup>5</sup> CJEU (Grand Chamber) Judgement of 19/11/2019, *A. K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy*, C-585, 624 and 625/18, ECLI: EU: C: 2019: 982 paragraphs 119 to 130.

<sup>6</sup> CJEU (Grand Chamber) Judgement of 19/11/2019, *A. K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy*, C-585, 624 and 625/18, ECLI: EU: C: 2019: 982 paragraphs 119 to 130.

which its members have been appointed<sup>7</sup> and provided with an appropriate legal status.

10. Judges of the European Union hold permanent tenure. Exceptionally, they may be dismissed for specified, proportionate and legitimate legal reasons - such as incapacity, retirement and serious misconduct - in accordance with procedures that carry appropriate guarantees<sup>8</sup>, subject to appeal before the courts of ordinary jurisdiction. Secondments are exceptional in nature and may only be granted by a competent body, and only for the duration and reasons provided for by law. When granting the secondment, the precise task shall be stated and its duration shall be only that necessary to complete the task, and there shall be no option to renew<sup>9</sup>.
11. In accordance with the principle of the separation of powers that characterises the functioning of the rule of law, the independence of judges of the European Union vis-à-vis legislative and executive powers must be guaranteed<sup>10</sup>, through the establishment of effective mechanisms for the protection of the judges to that effect. The European Commission may require compliance.
12. Guarantees of the independence and impartiality of judges of the European Union require that there are rules, not only regarding the appointment of its members, but also in regard to the composition of the body, the duration of the term of office and the grounds for abstention, disqualification and removal of its members, so as to dispel any legitimate doubt in the minds of the judiciary as to the imperviousness of that body to external factors and its neutrality with regard to the interests in dispute<sup>11</sup>.

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<sup>7</sup>ECHR Judgement of 01/09/2020, *Astráðsson v Iceland*, paras 231 and 233, ECLI: EC: ECHR: 2020: 1201JUD002637418 and CJEU (Grand Chamber) Judgement of 06/10/2021, *W.Z.*, C-487/19, ECLI: EU: C: 2021: 798, paragraphs 112 to 115,

<sup>8</sup> CJEU (Grand Chamber) Judgement of 06/10/2021, *W.Z.*, C-487/19, ECLI: EU: C: 2021: 798, paragraphs 113 to 115,

<sup>9</sup> CJEU (Grand Chamber) Judgement of 16/11/2021, *Sąd Okręgowy w Warszawie v WB and others*, C-748/19, ECLI: EU: C: 2021: 931

<sup>10</sup> CJEU Judgement of 10/11/2016, *Openbaar Ministerie v Krzysztof Marek Poltorak*, C-452/16, ECLI: EU: C: 2016: 858, paragraph 35 and CJEU (Grand Chamber) Judgement of 19/11/2019, *A. K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy*, C-585, 624 y 625/18, ECLI: EU: C: 2019: 982, paragraphs 119 to 130.

<sup>11</sup> CJEU (Grand Chamber) Judgement of 19/11/2019, *A. K. v Krajowa Rada Sądownictwa and CP and DO v Sąd Najwyższy*, C-585, 624 and 625/18, ECLI: EU: C: 2019: 982, paragraphs 119 to 130.

13. The principle of acquired status in matters of judicial independence determines that a member state may not amend its legislation in a way that results in reduced protection of the value of the rule of law, as embodied in Articles 2 and 19 of the TEU<sup>12</sup>.
14. Judges of the European Union shall refrain from any action, act or expression which might affect confidence in their impartiality and independence.
15. Independence of means determines that each state has the duty to ensure that judges of the European Union have adequate means for the proper performance of their task<sup>13</sup> and in particular in resolving cases within a reasonable period of time. In the event of non-compliance, the European Commission may require the state to take the necessary measures as a matter of urgency. The European Commission shall monitor compliance with Article 47 of the Charter of Fundamental Rights in relation to the deadline for member states to settle cases.
16. The social protection of judges of the European Union is part of judicial independence, such that the judges should not have a workload that endangers their occupational health. To this end, a study should be conducted of the maximum workload that can be taken on within each member state, and effective measures should be taken to resolve any work overload.
17. Judges of the European Union should not take part in political functions. Thus, once such access has taken place, they will not be able to return to judicial functions.
18. The governing body of the judiciary in each member state should be given the legislative initiative, shared with its parliaments and government, for any legal amendment affecting its statute. This guarantee is a reflection of Articles 281 TFEU, 63 and 64 of Protocol 3 approving the statute of the Court of Justice.

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<sup>12</sup> CJEU (Grand Chamber) Judgement of 20/04/2021, *Republika v Il-Prim Ministru*, C-896/19, ECLI: EU: C: 2021: 311, paragraphs 47 et seq.

<sup>13</sup> Opinion of Advocate General Bobeck of 06/10/2021, *X and Z v Autoriteit Persoonsgegevens*, C-245/20, ECLI: EU: C: 2021: 822, paragraphs 85 et seq.

## II. THE NATIONAL JUDGES AS GUARANTORS FOR THE APPLICATION OF UNION LAW

19. The principle of the primacy of Union Law enshrines the pre-eminence of Union Law over member states' law<sup>14</sup>. This principle imposes upon all member states' bodies and institutions a requirement to ensure the full effectiveness of Union rules; member states' laws shall not be entitled to alter the recognised effectiveness of those rules within their territories<sup>15</sup>.
20. The principle of interpretation in accordance with national law - under which a national court is required to interpret national law as far as possible in line with the requirements of European Union Law - is inherent in the system of treaties, in so far as it enables judges of the European Union to ensure, as part of their jurisdiction, the full effectiveness of European Union Law when deciding the dispute before them<sup>16</sup>.
21. Under the principle of primacy, where it is not possible to interpret national legislation in accordance with the requirements of Union Law, judges of the European Union responsible for applying the provisions of Union Law within their jurisdiction are required to ensure that such provisions are fully effective by disapplying, if necessary and at their own initiative, any contrary provision of national legislation, including subsequent legislation, without having to request or await its prior removal through legislation or any other constitutional procedure<sup>17</sup>.
22. More particularly, judges of the European Union hearing a case within their jurisdiction shall be required to refrain from applying any national provision that is contrary to a provision under Union Law with direct effect in the dispute before them<sup>18</sup>.

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<sup>14</sup> CJEU (Grand Chamber) Judgement of 24/06/2019, Daniel Adam Popławski, C-573/17, ECLI: EU: C: 2019: 530, paragraph 53 and cited case law.

<sup>15</sup> CJEU (Grand Chamber) Judgement of 24/06/2019, Daniel Adam Popławski, C-573/17, ECLI: EU: C: 2019: 530, paragraph 54 and cited case law.

<sup>16</sup> CJEU (Grand Chamber) Judgement of 24/06/2019, Daniel Adam Popławski, C-573/17, ECLI: EU: C: 2019: 530, paragraph 54 and cited case law.

<sup>17</sup> CJEU (Grand Chamber) Judgement of 24/06/2019, Daniel Adam Popławski, C-573/17, ECLI: EU: C: 2019: 530, paragraph 54 and cited case law.

<sup>18</sup> CJEU (Grand Chamber) Judgement of 24/06/2019, Daniel Adam Popławski, C-573/17, ECLI: EU: C: 2019: 530, paragraph 61 and cited case law.

### **III. SELECTION, APPOINTMENT AND PROFESSIONAL CAREER**

23. Decisions relating to the selection, recruitment, appointment, career development or removal from office of judges of the European Union shall be made either by a body independent of the executive and legislature - at least half of whose members shall be judges, preferably chosen by the judges themselves in accordance with a procedure ensuring the widest possible representation - or on a proposal from, or with the agreement of or in accordance with the opinion of, that body. In any case, such decisions shall be based on the principles of merit and ability, following a comparative examination of the applicants on the basis of pre-established objective criteria.
24. Candidates will be selected on the basis of their ability to perform the specific judicial duties. Candidates may not be discriminated against on grounds of sex, ethnic or social origin, philosophical and political opinions and religious convictions.
25. The state shall ensure the preparation and training of successful candidates to perform these functions effectively. The body referred to in Point 23 shall ensure that training programmes and bodies implementing them are aligned with the requirements of openness, competence and impartiality, inherent in the exercise of judicial functions.
26. The decisions to appoint the selected candidates as judges of the European Union and to assign them to a tribunal shall be taken by an independent body.
27. In performing their duties in a court judges of the European Union shall not, in principle, be eligible for reappointment or reassignment, including by being promoted, without their free consent. The only exception to this principle shall be where the transfer is part of a disciplinary sanction or where it has been declared in the case of a legal change to the judicial organisation.
28. Initial and ongoing training of national judges of the European Union is a right and a duty and must be promoted, organised and managed by the enforcing body, as a guarantee of their independence, quality and efficiency of the judicial system. Any technical, social and cultural knowledge that Judges of the European Union need to exercise their duties shall be guaranteed, both in terms of maintenance and improvement, via regular access to training courses; this shall be at the expense of the state.

29. Professional careers shall be based on seniority or ability and merit. In the latter case, it shall be on the basis of objective assessments made by or with the agreement of an authority independent of the executive and legislature. Judges of the European Union who are not put forward for promotion have the right to file a complaint.

#### **IV. COMPENSATION SCHEME**

30. Judges of the European Union' remuneration, retirement scheme and health care shall be guaranteed via a regulation backed by law.
31. Judges of the European Union shall have economic autonomy from the executive and the legislature.
32. Judges of the European Union' remuneration shall be commensurate with the importance of the duties they perform and shall not be less than that of senior state officials<sup>19</sup>.
33. Judges of the European Union salaries shall at no time be reduced during their term of office, unless: a) it is a consequence of applying the taxation system, or b) it is part of an emergency budgetary adjustment, and so long as such reduction is applicable to all members of the public service, it is proportional, and it is repaid at the original amount once the economic crisis which justifies such a measure has passed<sup>20</sup>.
34. Judges of the European Union who have reached the legal retirement age shall, provided they have been in office for a certain period, be entitled to a retirement pension, the amount of which shall be as close as possible to their last judicial remuneration and which shall in any event not be less than 80 % of their last judicial remuneration.
35. Judges of the European Union' salaries and pensions shall not be determined by using individual assessments.
36. Only activities which affect the impartiality or independence of judges of the European Union or which substantially impair their ability to deal with cases before them properly and within a reasonable time may be considered incompatible with the performance of their judicial duties.

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<sup>19</sup> CJEU (Grand Chamber) Judgement of 27/02/2018, Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, ECLI: EU: C: 2018: 117, paragraphs 44 and 45.

<sup>20</sup> CJEU Judgement of 07/02/2019, Carlos Escribano Vindel v Ministry of Justice, C 49/18, ECLI: EU: C: 2019: 106

37. Judges of the European Union shall be free to pursue any activity outside their mandate, unless such activity is considered incompatible with the proper exercise of the judicial function of their office.
38. The pursuit by judges of the European Union of any outside activity other than a literary or artistic activity, and which is remunerated, must be authorised in advance.

## **V. DISCIPLINARY REGIME<sup>21</sup>**

39. The following shall be governed by a regulation backed by law: disciplinary offences and penalties that apply to judges of the European Union; the procedure for their imposition by an independent, impartial and non-judicial administrative body; and the system of judicial review of such decisions.
40. The catalogue of disciplinary offences applicable to judges of the European Union shall comply with the principles of objectivity, verifiability, clarity and precision.
41. Disciplinary proceedings applicable to judges of the European Union shall guarantee the right to be heard within a reasonable time and respect the rights of defence.
42. Judges of the European Union shall not be liable to disciplinary action for what they do outside the performance of their duties, or for unintentional conduct, or for the mere referral of a preliminary ruling to the CJEU, or for simply having interpreted and applied rules, or assessing facts and evaluating evidence subsequently overturned by a hierarchically superior body.
43. The principles underlying the code of ethics that informs judicial careers do not form part of the disciplinary regime.
44. The inspection and disciplinary regime must have the necessary safeguards to avoid any risk that it could be used as a system of political control over the content of judicial decisions<sup>22</sup>.

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<sup>21</sup> CJEU (Grand Chamber) Judgement of 15/07/2021, *European Commission v Republic of Poland*, C-791/19, ECLI: EU: C: 2021: 596 and CJEU (Grand Chamber) Judgement of 26/03/2020, *Miasto Łowicz v Skarb Państwa - Wojewoda Łódzki and Prokurator Generalny v VX and Others*, C-558 and 563/18, ECLI: EU: C: 2020: 234

<sup>22</sup> CJEU (Grand Chamber) Judgement of 18/05/2021, *Asociația "Forumul Judecătorilor din România" and Others v Inspecția Judiciară and Others*, C-83, 127, 195, 291, 355 and 397/19, ECLI: EU:C:2021: 393, paragraphs 198 to 205.

## **VI. PUBLIC LIABILITY**

45. The state's right of recourse established by an independent, impartial and non-judicial administrative body against the conduct of any judge of the European Union who causes a miscarriage of justice or unjustified delays shall be exceptional and, if applicable, shall only be applied in cases of intent or gross negligence; it shall, in any event, be subject to appeal in the courts.
46. Judges of the European Union shall enjoy functional immunity, meaning that they shall not be exposed to any action for damages where they are exercising their functions in accordance with the professional rules as laid down by law.