

Judges marking their own Homework (Vivacom Bulgaria C-369/23)

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Introduction

Is a judge truly impartial when required to assess the ruling of a colleague from the same judicial body?

That, in essence, was the question addressed by the Court of Justice in [Vivacom Bulgaria](#) (19 December 2024, C-369/23). As is well known, since [Köbler](#) (C-224/01), the Court has recognised the non-contractual liability of Member States towards individuals *even for* breaches of EU law committed by national courts. As a result, if individuals believe that a court adjudicating at last instance has manifestly infringed rights conferred by EU law, they may seek compensation for the damages suffered before the relevant domestic jurisdiction.

However, this scenario may lead to situations in which –pursuant to national legislation– the court naturally competent to hear the damages claim is the very judicial body whose earlier decision is being challenged. This inevitably raises questions about the impartiality of the latter, particularly given that even the mere appearance of neutrality with respect to the interests before it is protected by the Court of Justice under Article 19 TEU and Article 47 of the Charter (cf., e.g., the *A.K.* judgment, Joined Cases [C-585/18](#), [C-624/18](#) and [C-625/18](#), especially para. 128).

In *Vivacom Bulgaria*, the Court of Justice did not hold such a scenario to be *per se* incompatible with the judicial independence requirements laid down in its case law. Instead, it set out the specific safeguards required to ensure that the independence of the adjudicating body remains beyond reproach.

Order for Reference

The main proceedings stemmed from an action for damages brought by Vivacom Bulgaria against the Bulgarian State before the Administrativen sad Sofia-grad (Administrative Court, Sofia - Bulgaria; hereinafter ‘the ASSG’), in relation to a judicial error allegedly committed, in a previous tax dispute, by the Varhoven administrativen sad (Supreme Administrative Court - Bulgaria; hereinafter ‘the VAS’). According to the claimant, the VAS applied certain provisions of the [VAT Directive](#) contrary to the interpretation provided by the Court of Justice in its case law. It should be noted that the action was brought before the ASSG precisely because, under Bulgarian legislation, administrative courts are those that have jurisdiction over damages claims arising from breaches of EU law attributed to the VAS.

After the ASSG dismissed the action at first instance, Vivacom appealed before the VAS, the referring court in this case. Vivacom promptly pointed out that, although the action for damages would have been heard by a

panel different from the one that had decided the previous tax proceeding, ‘the simultaneous role of the VAS as the court of last instance and a party to the dispute [did] not meet the requirements of a fair hearing by an independent and impartial court under EU law’ (para. 14 of *Vivacom Bulgaria*).

Instead of ruling on the merits immediately, the VAS decided to stay the proceedings and make a preliminary reference to the Court, asking whether such a system was compatible with the guarantees set out in Articles 19 TEU and 47 of the Charter. Referring the matter to the Court appeared especially appropriate because, although legal scholars have long addressed this issue, neither the *Köbler* judgment nor the Court’s subsequent case law has ever expressly clarified it (cf., at the time of the *Köbler* judgment, A. Garde, [*Member States’ liability for judicial acts or omissions: much ado about nothing?*](#), in *Cambridge Law Journal*, Vol. 63, No. 3, 2004, p. 567: ‘not only is the *Köbler* test extremely restrictive but it is also unlikely to be applied in national courts. It is arguable that *Köbler* raises more questions than it provides answers’).

Decision

After the description of the dispute in the main proceedings and of the question referred, the Court of Justice recalled straightaway that, under Art. 19(1), subpara. 2 TEU and Art. 47(2) CFREU, Member States ‘are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law’, including ‘the fundamental right to an independent and impartial tribunal’ when they are implementing EU law, as in this case (paras. 26 and 27 of *Vivacom Bulgaria*). In this regard, the Court of Justice referred to its settled case-law on the independence of the national courts, according to which ‘the guarantees [...] required under EU law presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals’ (para. 32 of *Vivacom Bulgaria*; see also judgment of 8 May 2024, [C-53/23](#), *Asociația ‘Forumul Judecătorilor din România’* (Associations of judges), para. 51).

At this point, the Kirchberg judges proceeded to examine whether a liability system such as the Bulgarian one described complies with the aforementioned provisions.

The Court promptly determined that the fact that the case was formally adjudicated by the same judicial body to whom liability is attributed is not incompatible, ‘as a matter of principle’, with Articles 19 TEU and 47 of the Charter, provided that, in practice, the necessary safeguards are in place. Indeed, the procedural autonomy vested in Member States enables them to regulate their own judicial systems according to their preferences, as long as effective judicial protection is assured for individuals (paras. 36 and 37 of *Vivacom Bulgaria*).

Among the safeguards that must be ensured – safeguards whose existence must be verified on a case-by-case and concrete basis by the national court – the Court of Justice has underscored the importance that the adjudicating panel in the liability action be composed of members different not only from those who rendered the initial judgment on which the action for damage is based (paras. 49-50) but also from those who prepared the defence of the judicial body in the first-instance liability proceeding (paras. 38, 42 and 43 of *Vivacom Bulgaria*).

To further substantiate this, the Court has emphasised how, on multiple occasions, it has simultaneously acted as both judge and party in non-contractual liability actions brought before itself pursuant to Articles 268 and 340 TFEU (para. 39 of *Vivacom Bulgaria*; see, e.g., *European Union v Kendrion*, [C-150/17 P](#)); and that this occurred always in compliance with the right to an independent tribunal under Article 47 CFREU, as the EU judges appointed to handle the second dispute were different from those which heard the dispute giving rise to the first proceeding (para. 49 of *Vivacom Bulgaria*).

Upon the conclusion of the preliminary ruling, while deferring the final decision to the referring court, the Court has implied that the Bulgarian system was fully compatible with EU law.

Concluding Remarks

The Court of Justice's judgment in the *Vivacom Bulgaria* case expressly clarifies questions that were left unanswered by [Köbler](#), yet its conclusions are not at all surprising.

As has long been highlighted by EU law scholars, the principle of procedural autonomy leaves a wide discretion to Member States regarding the organisation of their own justice systems, including non-contractual liability actions (see F. Ferraro, *La responsabilità risarcitoria degli Stati per violazione del diritto dell'Unione*, II ed., Milano, 2012, p. 126 ss.); organisation that can only be challenged in cases of substantial deviations from the principle of effective judicial protection.

While it is true that liability models such as the Bulgarian one are compatible with the independence guarantees prescribed by EU law, significant substantial concerns remain when 'a judge judges a judge', particularly when they belong to the same judicial body and any potential damages award would thereby affect the institution that employs them.

In this regard, the attribution of jurisdiction on liability actions arising from judicial errors to a different judicial body from that which is a party in the action for damages (e.g., to ordinary judges for the judgments of the administrative courts and vice versa) would certainly contribute to enhancing 'the trust which justice in a democratic society governed by the rule of law must inspire in individuals' (para. 44 of *Vivacom Bulgaria*).

In her [Opinion in the case](#), Advocate General Ćapeta seems to have taken this argument even further, stating that 'the likelihood of partiality is even lower if another branch of government decides' (11 July 2024, para. 51). While it is true that conferring the competence in such circumstances to a different constitutional body completely resolves the issue of impartiality, it is also true that such a solution risks creating new and potentially more serious issues from the perspective of the independence of the judiciary and the respect for the separation of powers.

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Circolo, A.; "Judges marking their own Homework (Vivacom Bulgaria C-369/23)", EU Law Live, 28/01/2025, <https://eulawlive.com/op-ed-judges-marking-their-own-homework-vivacom-bulgaria-c-369-23/>