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**INDEPENDENCE OF REGULATORY AUTHORITIES  
IN THE ENERGY MARKET. COMMENT TO THE  
JUDGEMENT OF EU COURT OF JUSTICE IN  
C-378/19 PREZIDENT SLOVENSKEJ REPUBLIKY**

**Abstract:** In its judgement C-378/19, the Court of Justice of the European Union responded to the question for a preliminary ruling referred by the Slovak Constitutional Court. The ECJ found in this judgement that Directive 2009/72/EC must be interpreted as not precluding withdrawal of the competence of the President of a Member State to appoint and dismiss the chairperson of the national regulatory authority, and conferral of the same power to the Member State's government. Similarly, allowing the participation of the Ministers of the Environment and of the Economy in certain price-setting procedures does not violate the decision-making independence of the national regulatory authority. In his commentary, the author cites the line of argument in the judgement and presents the political context in Slovakia that led to the preliminary question. The author then comments approvingly on the judgement, noting that the Court rightly refrained from assessing the political situation in Slovakia, instead opting to focus on the law. At the end of the commentary, the author makes remarks of a general nature relating to the independence of national regulatory authorities.

**Keywords:** Directive 2009/72, Directive 2019/944, independence of regulatory authorities, energy law

## 1. Facts and Relevant Law

The reference for the preliminary ruling of 14 May 2019 of the Ústavný Súd Slovenskej Republiky (Constitutional Court of the Slovak Republic) referred to the meaning and essence of the independence of the regulatory authority in the energy law and in particular to the autonomy of national law in regulating the procedure and the manner of appointing the authorities in question. The commented case concerns two main issues: who may appoint the regulatory authority according to Slovak law (1) and who might be the party in the tariff regulation procedure in Slovak Law (2). It must first be explained how these two issues had been regulated before and after the amendment discussed below.

The Slovak law on regulation in the network industries (Law No. 250/2012<sup>1</sup>) before the amendment from 2017 stated: ‘The Regulatory Authority shall be headed by the chairman, appointed and dismissed by the President of the Slovak Republic on a proposal from the Government of the Slovak Republic’. Law No. 164/2017<sup>2</sup> changed the manner of the appointment. According to the new provision ‘the Regulatory Authority shall be headed by the chairman, appointed and dismissed by the Government of the Slovak Republic’.

In the explanatory memorandum to Law No. 164/2017 concerning the referred provision, it was outlined that the government of the Slovak Republic bears full responsibility for the energy sector and the powers of the President of the Republic in this sector are very limited. Therefore it was appropriate and logical that the power to appoint and dismiss the chairman of the authority was transferred fully to the government, excluding the President from this procedure.

The second provision that the commented case refers to is on the tariff regulation procedure. The amendment of the Law on regulation in the network industries from 2017 (Law No. 164/2017) introduced to the

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<sup>1</sup> Zákon zo 31 júla 2012 o regulácii v sieťových, 250/2012 Z.z.

<sup>2</sup> Zákon zo 13 júna 2017 ktorým sa mení a dopĺňa zákon č. 250/2012 Z. z. o regulácii v sieťových odvetviach v znení neskorších predpisov, 164/2017 Z.z.

legal system of the Slovak law the active participation of two ministries (the Minister of the Economy and the Minister of the Environment) in certain tariff procedures. They gained the status of parties to the procedure. The aim of the amendment was explained in the explanatory memorandum to Law No. 164/2017, which states that the participation of these two ministers aims to protect the public interest.

The two abovementioned amendments of the Law on regulation in the network industries had been under the scrutiny of the Constitutional Court of the Slovak Republic upon request of the President of the Republic. The application of the President was based on the assumption that the contested provisions of the Law on regulation in the network industries constitute an incorrect transposition of Directive 2009/72<sup>3</sup> and of Directive 2009/73<sup>4</sup> with the result that they are contrary to Article 4(3) of the Treaty on the European Union and to Article 288 of the Treaty on the Functioning of the European Union and, therefore, in parallel, also with Article 1(1) and (2) of the Slovak Constitution.

The Constitutional Court of the Slovak Republic has decided to refer questions for a preliminary ruling to the Court of Justice. The questions were as follows:

- ‘Can Article 35(4) of Directive 2009/72 [...] be interpreted, in particular in the light of recital 33 thereof, as precluding, in a Member State, in the context of the amendment of a national measure transposing that directive, the power to nominate and dismiss the chairman of the Regulatory Authority from being withdrawn from the President of the Republic, who is directly elected by the citizens, and conferred instead on the Government, with the result that the legal situation which existed prior to the transposition of the directive is restored?’
- ‘Is it possible to interpret Article 35(5) of Directive 2009/72 [...], in particular in the light of recital 34 thereof, as precluding a rule of national law which, in order to ensure defence of the public

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<sup>3</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, pp. 35-93.

<sup>4</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/55/EC, OJ L 211, pp. 94-136.

interest, permits ministers to take part in the tariff regulation procedure at the Regulatory Authority’?

The questions refer to the regulation of Directive 2009/72,<sup>5</sup> which regulates common market in electric energy. Article 35(4) of Directive 2009/72 states: ‘Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently’.<sup>6</sup> Further on in the provision it is explained how the expression ‘impartially’ is to be understood. Among other conditions, the regulatory authority is to be legally distinct and functionally independent from any other public entity and must not seek direct instructions from any government when carrying out the regulatory tasks. The provision regulating independence is parallel to the regulations laid down in Directive 2009/73, therefore the ruling was limited to the provisions of Directive 2009/72. In recital 33 of Directive 2009/72 it was stressed that the effectiveness of the regulation was frequently hampered through a lack of independence of regulators from government, as well as their insufficient powers and discretion. In order to solve this problem, Article 35(4) was adopted.

The second question of the Slovak Constitutional Court tackled the problem of the procedure and referred to Article 35(5) of Directive 2009/72. This provision required Member States to protect the independence of regulatory authorities, ensuring that they make autonomous decisions, independently from any political body.<sup>7</sup> In the aforementioned recital 34 of Directive 2009/72 it was stated that the regulatory authorities had to make decisions fully independently from any other public or private interests.

In the request for a preliminary ruling the Constitutional Court of the Slovak Republic explained the need for a reply to the questions referred.<sup>8</sup> The Court had doubts as to whether the national Slovak law had failed to correctly transpose Directives 2009/72 and 2009/73 as regards the need

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<sup>5</sup> In the request for a preliminary ruling, the Constitutional Court of the Slovak Republic stated that in order to simplify matters the wording of the questions referred only to the interpretation of Directive 2009/72. Given the identical rules on independence in Directives 2009/72 and 2009/73, the replies of the Court of Justice of the European Union had to apply to Directive 2009/73.

<sup>6</sup> Directive 2009/944 of the European Parliament and of the Council of 5 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2012/27/EU, OJ L 158, pp. 125-199.

<sup>7</sup> The provision has been repeated in Article 57(5) of Directive 2019/944.

<sup>8</sup> Request for a preliminary ruling of 14 May 2019 in Case C-387/19.

to ensure the independence of the regulatory authority. Furthermore, the Court expressed the need for interpretation of the notion of 'independence'.

The doubts of the Court related to the objective pursued by the directive, which was to contribute to strengthening the independence of the regulatory authority. The amendment of the law in Slovakia allegedly led in the opposite direction. It weakened the position of the regulatory authority by strengthening its bond to the government in particular in two aspects: the appointment and certain tariff procedures. Furthermore, Law No. 164/2017 was adopted after Directive 2009/72 came into effect, making the law on regulation in the network industries less compatible with the directive than it had been before the amendment.

## **2. Court's Position**

In its judgement of 11 June 2020<sup>9</sup>, the Court answered the questions stating that Directive 2009/72 must be interpreted as not precluding legislation of a Member State which provides that the government of that State is competent to appoint and dismiss the chairperson of the national regulatory authority, to the extent that all the requirements laid down in the directive are complied with. Answering the second question the Court concluded that the provisions of Directive 2009/72 must be interpreted as not precluding the national legislation of a Member State which, to ensure the public interest is protected, prescribes that representatives of ministries of that state participate in certain procedures before the national regulatory body concerning price setting to the extent that the authority's independence in decision-making is respected.

In the grounds to its judgement, the Court pointed out that Directive 2009/72 is essentially aimed at establishing an open and competitive internal electricity market. It continued by noting that for the purposes of pursuing these objectives, Directive 2009/72 gives the national regulator broad prerogatives in regulating and monitoring the electricity market and above all grants it independent status. The Court expressed the view that within the scope in which a regulatory authority is not deprived of competences and independence, the manner of its appointment remains within the remit of the Member State. Thus, the amendment to Slovak

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<sup>9</sup> C-378/19 *Prezident Slovenskej republiky*, ECLI:EU:C:2020:462.

law that transferred the competences to appoint and dismiss the national regulatory authority from the President to the government, complies with Directive 2009/72. Moreover, it merits attention that restoration of the legal circumstances from the time when Directive 2003/54 was effective and this does not have to mean incompliance with the independence requirements laid down in Directive 2009/72.

In response to the first of the two questions, the Court found that Directive 2009/72 does not define the concept of ‘independence’ and it should therefore be construed in its usual meaning. Thus, as regards public bodies, independence usually refers to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured, shielded from any instructions or pressure (Cf. judgement of 13 June 2018, *Commission v. Poland*, C-530/16, para 67).<sup>10</sup> The Court noted that the competences to appoint and dismiss the board or officers of a national regulatory authority should be strictly specified by the law and exercised based on objective, clear, exhaustive and verifiable criteria, and that none of the provisions of Directive 2009/72 determine which body should appoint them.<sup>11</sup> The appointment and dismissal of the national regulatory authority should be undertaken in a way that guarantees independence, yet the exact manner of institutional implementation of the directive is left to the Member State.

In response to the second of the two questions, the Court found that Directive 2009/72 does not prohibit representatives of national ministries from participating in certain procedures concerning price setting, which relate in particular to access to the network for the transmission and distribution of electricity as well as to the transmission and distribution of electricity.<sup>12</sup> Therefore, Member States may allow other bodies to participate in price-setting procedures provided that these bodies do not interfere with the independence of the national regulatory authority. The Slovak government substantiated the need for participation of other state organs in the procedure. In its view, such procedures are in the general interest of the whole of society, especially as regards the objectives and priorities of the Slovak Republic’s energy policy.<sup>13</sup> At the same time, the Slovak government confirmed that it is not vested with any specific power to interfere with

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<sup>10</sup> *Prezident Slovenskej republiky*, para. 32.

<sup>11</sup> *Prezident Slovenskej republiky*, para. 36.

<sup>12</sup> *Prezident Slovenskej republiky*, para. 55.

<sup>13</sup> *Prezident Slovenskej republiky*, para. 58.

the decisions issued by the regulatory authority.<sup>14</sup> The Court agreed with the Slovak Republic's government, finding the solutions adopted to be conforming to Directive 2009/72. At the same time, it reserved that the competences of other organs cannot infringe on the decision-making independence of the national regulatory authority. As a side note, it merits a mention that the President of the Slovak Republic raised that even before the amendment the regulatory authority had revoked its original decisions under the government's pressure, replacing them with decisions in line with the political will of the government.<sup>15</sup> Nevertheless, the Court observed that the referring court was not describing the decision-making practices of the national regulatory authority, and thus the ECJ could not address them.<sup>16</sup>

### **3. Significance of the Judgement. Commentary.**

Three types of remarks should be made in light of the discussed judgement. The first type concerns the political context of the matter at hand. The second regards the law in its current wording and interpretation. The third type of remarks are of a general nature, referring to the broader legal and political science context of the discussed judgement. This is because the independence of regulatory authorities is a topic considered by political science experts in light of both the exercise of power and its division, as well by legal scholars.

As for the first type, it must be noted that in this case, there is no doubt that the underlying dispute is both of a legal and political nature. Until the amendment introduced by Law No. 164/2017, the chairperson of the Regulatory Authority for Network Industries (ÚRSO) was appointed and dismissed by the President of the Republic of Slovakia, chosen in direct elections, who thus has a strong political mandate. And yet, the President does not form the government, and so he or she bears no political responsibility for the condition of the economy. The government of Robert Fico, representing a different political option than that of President Andrej Kiska, led to the amendment of law that allowed it to appoint Fico's

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<sup>14</sup> *Prezident Slovenskej republiky*, para. 59.

<sup>15</sup> *Prezident Slovenskej republiky*, para. 60.

<sup>16</sup> *Prezident Slovenskej republiky*, para. 61.



long-standing party colleague, Ľubomír Jahnátek<sup>17</sup> as chairman of ÚRSO. In the eyes of many Slovak citizens this represented a change of a political, rather than official or expert, nature. The opposition held the same view. It is worth noting that Jahnátek went through the competition procedure and was nominated by the Association of Employers' Unions (AZZZ), not by the ruling party. Therefore, from the formal point of view, he had been appointed properly. It should also be mentioned that the newly appointed ÚRSO chairman asserted that his objective was to shape stable long-term electrical energy prices.<sup>18</sup> Moreover, it follows from the judgement discussed that owing to political pressure, electrical energy tariffs had been changed before, and so the government made it clear that it wants to influence this sector by means of the regulatory authority's powers.<sup>19</sup> The context of this case, therefore, indicates that the Slovak case brought to the ECJ had a political background marked by a conflict between the government against the opposition and the President. Opposition representatives and the President counted on support from the European justice system.

As for the law and its interpretation, there is no doubt that the previous wording of Article 35 of Directive 2009/72 and the current Article 57 of Directive 2019/944 mandate member states to ensure the independence of the National Regulatory Authority from public and private entities. The directive identifies a number of attributes of independence, such as decision-making independence (including independence from any public entity), budgetary independence (ensuring the necessary financial resources and independence in spending them), functional independence (separate civil servants) and termed offices (appointment for 5 to 7 years). The expert nature of the authority is to be safeguarded by the prescription to appoint candidates based on objective, transparent and published criteria, in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience for the relevant position in the regulatory authority. Although, as the Court noted, the

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<sup>17</sup> Laukova, 'Kiska neuspel v spore o Jahnátka. Luxemburg dal za pravdu Ficovej vláde', <https://slovensko.hnonline.sk/2162102-kiska-neuspel-v-spore-o-jahnatka-luxemburg-dal-za-pravdu-ficovej-vlade> (accessed on: 30 March 2021).

<sup>18</sup> 'Jahnátek will Become the New Head of the Regulatory Uuthority, ÚRSO', <https://spectator.sme.sk/c/20610960/jahnatek-will-become-the-new-head-of-the-regulatory-authority-urso.html> (accessed on 30 March 2021).

<sup>19</sup> *Prezident Slovenskej republiky*, para. 61.



concept of independence is not defined,<sup>20</sup> it is sufficiently described to leave no doubt as to the requirements imposed on Member States.

It is a well-known fact that the independence of the national regulatory authorities in the field of energy, as in other areas of the economy such as telecommunications, aviation, railroads, competition protection, has been steadily strengthened for at least the past 10 years by successive legislative acts of European Union law. This seems to be a stable trend and there is nothing to indicate that it might change. Therefore, it is not surprising that the judgement in question only confirms the independence requirements set forth in the directive. The Court's judgement feeds into the general current tendency.

What is worth noting and emphasizing with approval, is the fact that the Court did not let itself become embroiled in a national political dispute. Transfer of the competence to appoint the regulatory authority from the President to the government, as well as allowing the Ministers of Economy and Environment to participate in the pricing procedure is within the autonomy of the state implementing the directive and does not violate the requirements of independence, even if they are narrowly outlined. The same holds true even if the amendment of law, in terms of intentions and results, is perceived as political and leading to greater influence of the government. As a side note, it should be noted that the directive requirements concerning independence do not preclude cooperation of the national regulatory authority with the government. Pursuant to Article 57 (4b) (ii) of Directive 2019/944, the requirement of independence is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 59. Thus, the tension and need to seek balance between the decision-making independence of the national regulatory authority and the need to align its activities with the government's policies is recognized in the directive itself, although it does give preference to the decision-making independence in the area of competences indicated in Article 59 of Directive 2019/944. The Court did not address the need for cooperation and maintaining independence. It only reiterated that decision-making independence and the transparent criteria of appointing the national regulatory authority should be observed. What the national legislator has

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<sup>20</sup> *Prezident Slovenskej republiky*, para. 32.

left is ultimately ‘circumscribed discretion’<sup>21</sup> in defining the constitutional position and competences of the national regulatory authority.

The judgement, coupled with the events in Slovakia, invites some more general remarks. As already mentioned, the European Union is exhibiting a clear tendency to establish independent regulatory authorities. They are to be independent of both government policies and private entities. While the latter is obvious and related to the transparency and honesty in the relationship between state and the private sector, independence from government policies is not accepted without criticism in the literature of the subject. Independent administrative bodies have Anglo-Saxon origins. The United States had independent administrative agencies, and Great Britain had quangos.<sup>22</sup> Antonin Scalia wrote about American independent agencies, claiming that their creation was connected with the belief in the power of experts, devoid of political influence.<sup>23</sup> He believes that in practice this led to depriving the President of influence over certain areas of state competence, binding the agencies to Congress.<sup>24</sup> Thus, it was not so much that the agencies became completely independent: while freed from the influence of the President, they fell under the influence of Congress. Scalia doubted if experts are able to make decisions of such nature. It is difficult not to concede his point. Some of the agency competences were political par excellence. The same holds true for national regulatory authorities, as evidenced by the Slovak case. Pursuant to Article 59 (1a) of Directive 2019/944, the regulatory authority shall have a duty of fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies, or both. Therefore, national regulatory authorities have influence of the final prices on users’ bills. They make decisions on tariffs or investment plans, and the scope and direction of these decisions are often political in nature. The Slovak government must have been aware of this when it decided to bring the national regulatory authority closer to the government in terms of its position within the political system. Tariff decisions made just before elections can change their results. Thus, cohabitation and binding the regulatory authority to one of the branches of power is not without effect on politics. One can only imagine the many examples of how the independence of the national regulatory authority

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<sup>21</sup> Rizzuto, ‘The Independence’, 74.

<sup>22</sup> Swora, *Niezależne organy administracji*, 28.

<sup>23</sup> Scalia, *Mullahs of the West: Judges as Moral Arbiters*, 8.

<sup>24</sup> *Ibid.*, p. 9.

can be a risk factor to the government if this authority's management chose to use their competences as a political tool, even if inadvertently as to the consequences.

Scalia's remark on the system of interdependencies deserves to be addressed separately. In European conditions, it is difficult not to notice that emancipation of national regulatory authorities from the government at the same time strengthens their links to the Commission. Within the circumstances of domestic politics, the exercise of certain political functions against the government will necessarily entail seeking political support for one's own decisions, whether from the opposition or from the European Union. The preliminary ruling referral can also be interpreted from this angle. For this reason, the Court's judgement deserves approval, as one limited to legal aspects only. It is also advantageous that the Commission did not actively side with the President.

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An interesting general point was made also by Błachucki, who wrote about the New Management Policy that underpinned the creation of independent agencies.<sup>25</sup> It was to distinguish political activities from executive (administrative) ones that provide services. With time, however, the idea evolved and now independent agencies hold regulatory competences. In practice, the agencies began to exercise regulatory functions and to draft public policies, all the while not bearing any political responsibility.<sup>26</sup> These remarks invite reflection of the distinction between political competences and competences of another nature. As regards national regulatory authorities, then, the aim would be to distinguish supervisory competences from political ones. It is not an easy distinction, as politics tends to be all-encompassing. Ultimately, as Szyborska put it, even a walk in a forest can be political,<sup>27</sup> especially in a state with autocratic inclinations. Yet, steering clear of the absurd, it would be constructive to rethink the trajectory of the boundary between political competences per se and competences falling within the area of administrative supervision concerning safety. Although

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<sup>25</sup> Błachucki, 'Niezależność', 264.

<sup>26</sup> Shapiro, 'Deliberative', 341-353.

<sup>27</sup> Szyborska, 'Wiersz Dzieci epoki', <https://literatura.wywrota.pl/wiersz-klaszyka/40457-wislawa-szyborska-dzieci-epoki.html> (accessed on 1 April 2021).

the author of this text has no ambition of tracing these boundaries, it remains clear that it would be difficult to deprive governments of influence over setting prices for basic public services.

The Slovak case also reveals a certain conundrum. Namely, equipping the national regulatory authority with political competences leads to greater political pressures on this authority. This is a real threat to its independence and it weakens it where it is most needed, that is the area of administrative, supervisory activities. Japan provides us with a fitting illustration of what may happen in consequence.<sup>28</sup> It is widely held that the Fukushima disaster could have been avoided if the organs supervising the safety of nuclear installations had forced TEPCO to make greater outlays for safeguards. Historical data indicated that Fukushima was not prepared for a potential tsunami. The nuclear disaster undermined the trust enjoyed by the political elites in Japan.<sup>29</sup> Investigations have pinpointed political and economic connections between the state and business, resulting in a lack of independence of supervisory authorities, as the reason for oversight shortcomings that led to the disaster. A term was even coined to designate this specific system of interdependences: nuclear village (*genshiryoku mura* in Japanese).<sup>30</sup> While it is true that regulatory authorities do not have oversight of nuclear safety, their important competencies include licensing market operators for compliance with conditions or protecting consumers from possible market abuses. These aspects of their activities should be shielded from politics. This is especially important within the context of the fact that in many countries the energy sector is highly politicized by virtue of being run by the state, which gives rise to the temptation to exercise supervisory powers more leniently over state entities than over private or foreign ones.

In particular, the power to punish should be exercised independently, as it is of a quasi-judicial nature.<sup>31</sup> The fines imposed for violations can reach up to 10% of an energy company's annual turnover, and given how significant these amounts are, they should certainly be protected from political influence. It is in fact surprising that the financial penalties imposed

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<sup>28</sup> Wiślicki, 'W dekadę od awarii atomowej w Japonii, Europejskie Centrum Projektów Pozarządowych', <https://www.ecpp.org.pl/w-dekade-od-awarii-elektrowni-atomowej-w-japonii> (accessed on 1 April 2021).

<sup>29</sup> Wiślicki, *ibid.*

<sup>30</sup> Wiślicki, *ibid.*

<sup>31</sup> <sup>31</sup> De Somer, 'The Powers', 586.

by administrative authorities are entirely incomparable to fines imposed by law enforcement authorities and the criminal courts. It should be added that administrative bodies decide on objective liability, abstracting from guilt. The national regulatory authorities' power to impose penalties brings them closer to judicial authorities. However, since their competences are also of a regulatory nature, it is difficult to argue that all of their activities should be shielded by independence safeguards comparable to those of courts.<sup>32</sup>

I would like to focus on one more crucial aspect of the Slovak case. Ultimately, the government did all in its power to ensure that the appointment of the Prime Minister's trusted colleague was undertaken with observance to procedure and transparent, objective criteria. Slovak law provides all the attributes of independence to the NRA, as confirmed by the Court in the judgement discussed here. And yet, Slovak public opinion is convinced that the change in the law was dictated by political motives of the national regulatory authority and its connections with the government. This clearly illustrates that no legal safeguards can replace political culture. The Court cannot will it into being with its judgements, so it is good that it refrained from trying, as the effect could have been opposite to the intended one. The political culture of a nation is something so fragile that its development can only be observed from afar. External interferences can have an adverse effect on it, that is lead to greater polarisation within society and to aversion toward the European Union. Fortunately, in this case the Court did not succumb to the temptation of involvement, decided to keep its distance and limited itself to stating that the legal requirements of independence have been respected. What Slovakia chooses to do with them is its own internal affair. Let us hope that its political elite manages to create a culture of prestige and independence of the regulatory authorities.

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<sup>32</sup> See, however Rizzuto, 'The Independence', 72.

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