

Respect for the Rule of Law in the Case Law of the European Court of Justice

A Casebook Overview of Key Judgments since the Portuguese Judges Case



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Preface

Over the past years, respect for the rule of law has decreased in several EU Member States. This regression affects the whole of the European Union. The rule of law is not only a founding value of the EU as a political community, it is also the cornerstone of its operation as a legal order, based as it is on mutual recognition and trust between Member States.

Repeated Member States' breaches of the rule of law have not only prompted the unprecedented activation of the EU procedure that may lead to the suspension of their membership rights (the so-called "Article 7 procedure"). The European Court of Justice (ECJ) has also been called upon, by the Commission and national judges alike, to engage in the preservation of the rule of law in the EU.

As the present report demonstrates, this role has been remarkable. Through their case-by-case analysis of key decisions of the ECJ, the two authors show how the Court has operationalized the rule of law with a view to helping secure Member States' compliance therewith. In particular, it has articulated specific standards which national judicial systems must meet for Member States to fulfill their Treaty-based obligation to ensure effective legal protection in the fields covered by Union law.

The report offers a comprehensive guide to navigate this fast expanding case law, and to appreciate the latter's critical significance for the future of the EU. The study is published in the framework of a SIEPS' research project on the EU Rule of Law toolkit, which purports to provide timely and critical analysis of EU initiatives to confront the regression in the rule of law.

Göran von Sydow
Director, SIEPS

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Executive summary

The European Court of Justice is behind a recent and genuine enhancement of European constitutionalism, placing the rule of law, a long-established value and principle of EU law, at the centre stage. This rule of law-enhancing process of re-articulation of EU constitutionalism is ongoing and represents the Court of Justice's incrementalist response to the process of rule of law backsliding which first emerged in Hungary before spreading to Poland. This volume aims to present and critically analyse this judicial response on a case-by-case basis taking the Court's judgment of 27 February 2018 in Case C-64/16, *ASJP (Portuguese Judges)* as a departure point and its judgment of 15 July 2021 in Case C-791/19, *Commission v. Poland (Disciplinary Regime for Judges)* as a provisional end point. By offering key excerpts and a critical assessment of the Court of Justice's most important orders and judgments which have reshaped the meaning and scope of the EU rule of law principle and associated legal obligations since 2018, this casebook-style volume will be of interest to those wishing to gain an expert understanding of the crucial recent evolution in the field of EU rule of law through the lens of the Court's orders and judgments both taken individually and as a whole.

In order to better understand the meaning and scope of the EU Member States' obligation to ensure that their courts meet the requirement of effective judicial protection, this volume first offers a detailed examination of the judgment which can be viewed as belonging to the Pantheon of the European Court of Justice's rulings, on a par with *Van Gend en Loos* and *Costa*, that is, the Court's Grand Chamber ruling in *ASJP*, a case informally known as *Portuguese Judges*. This judgment, which may also be understood as the Court's first significant albeit indirect answer to the ongoing process of rule of law backsliding, first witnessed in Hungary and now under way in Poland, marked a new beginning for the rule of law as a fundamental and enforceable value of the EU legal order, referred to in Article 2 TEU and given concrete and justiciable expression by inter alia the second subparagraph of Article 19(1) TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

The European Commission's enforcement of the EU Member States' obligation to ensure that their courts meet the requirement of effective judicial protection is then detailed via an examination of several Court of Justice's orders and judgments. With respect to the Court's orders, four of them issued within the framework of infringement cases C-441/17 R (*Białowieża Forest*); C-619/18 R (*Independence of Poland's Supreme Court*); C-791/19 R (*Independence of the Disciplinary Chamber of Poland's Supreme Court*); and C-204/21 R (*Poland's*

Muzzle Law) are presented. While the first one predates the Court's ruling in *Portuguese Judges*, its inclusion in this volume was motivated by the fact that it prefigured the Court's subsequent and unprecedented orders in infringement actions directly concerned with the protection of judicial independence in Poland. With respect to the Court's judgments on the merits, the infringement rulings issued in Case C-192/18 (*Independence of the ordinary courts*); Case C-619/18 (*Independence of the Supreme Court*); and Case C-791/19 (*Disciplinary regime for judges*) are analysed. With these three judgments, Poland has become the first EU Member State to be found to have violated the second subparagraph of Article 19(1) TEU three infringement cases in a row.

The two most important rulings to date issued by the Court of Justice in response to national requests for a preliminary ruling originating in both instances from Polish courts in relation to the requirements of judicial independence under Article 19(1) TEU and/or Article 47 CFR are then assessed: Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. e.a. (Independence of the disciplinary chamber of the Supreme Court)* and Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*. These two judgments, in addition to providing further clarification regarding the obligation to ensure that national courts meet the requirement of effective judicial protection, also illustrate a new trend whereby Article 267 TFEU has emerged as a tool of self-defence for the national judges under attack and thus serves as an instrument of enforcement of the EU's fundamental values in a broader context where the European Commission appears keen to use infringement actions in the most leisurely and parsimonious way. Due to the lengthy nature of the present volume, the Court of Justice's preliminary judgments of 20 April 2021 in Case C-896/19 (*Maltese Judges*) and of 18 May 2021 in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 (*Romanian Judges*) are not examined individually but integrated in the analysis of the Court's infringement judgment of 15 July 2021 regarding Poland's new disciplinary regime for judges (Case C-791/19) and the Court's preliminary judgment of 2 March 2021 regarding Poland's 'fake judges' (Case C-824/18). This is not, however, to deny their importance and significant added value to the extent that they both make clear inter alia that national authorities are under a negative but also positive obligation to respect EU requirements relating to judicial independence as well as an obligation not to regress in this area. In more practical terms, this means that a Member State cannot post accession adopt rules undermining judicial independence as this would violate the second subparagraph of Article 19(1) TEU which prohibits national authorities from adopting new legislation amounting to a regression in the Member State concerned in the protection of the value of the rule of law, in particular the EU guarantees relating to judicial independence. It also means an obligation to refrain from adopting legislative changes which undermine the rule of law, which is the case when, for instance, a new special prosecution section is established and is used as an instrument of pressure and intimidation with regard

to judges, or when national authorities adopt new rules regarding the personal liability of judges which fail to provide guarantees designed to avoid any risk of external pressure on the content of judicial decisions.

Looking beyond cases directly raising judicial independence issues, this volume also examines a number of cases which arguably show that the process of rule of law backsliding in some EU countries has had a significant albeit often implicit impact on other areas of the Court's case law, with the Court arguably recalibrating its interpretation and approaches in relation to several fundamental concepts in EU law primarily in light of the situation in Poland. This impact can be first evidenced in the stricter interpretation of the meaning of 'court of tribunal' in the sense of Article 267 TFEU used in Case C-274/14 *Banco de Santander*. A similar tightening of the concept of 'issuing judicial authority' within the meaning of the European arrest warrant (EAW) can be detected in Joined Cases C-508/18 *OG (Public Prosecutor's Office of Lübeck)* and C-82/19 *PPU PI (Public Prosecutor's Office of Zwickau)*, as well as in Case C-509/18 *PF (Prosecutor General of Lithuania)*. Another significant development, likely to have been brought about, at least in part, in reaction to Poland's rule of law crisis, can be found in Case C-284/14 *Commission v. France (Advance Payment)*, where the Court offered a long-awaited recalibration of *CILFIT*. The Court also pushed for a stricter defence of the jurisdiction of the national courts to ensure full effectiveness of EU law in Case C-284/16 *Achmea*, a stricter defence which however threatens to leave investors formerly covered by intra-EU bilateral investment treaties (BITs) without any judicial protection at all in countries experiencing rule of law backsliding. The Court also enabled, at least theoretically, stricter scrutiny by judicial authorities called upon to execute EAWs of mutual trust obligations on account of systemic deficiencies which may affect the independence of a national judiciary in a backsliding Member State in Case C-216/18 *PPU LM (Celmer)*. This recalibration may however be viewed as patently insufficient considering the systemic nature and current extent of Poland's rule of law breakdown. Finally, the Court adopted a demanding interpretation of the requirement of 'established by law' to comprehensively review an EU judicial appointment procedure in its Grand Chamber judgment of 26 March 2020 in Joined Cases C-542/18 *RX-II Simpson* and C-543/18 *RX-II HG*. While this judgment did not concern a national judicial appointment procedure, it was easy to see how the Court's reasoning could be extrapolated to the situation in Poland where manifest irregularities have repeatedly affected the appointments of multiple individuals, in particular to the Supreme Court.

This volume ends with the Court of Justice's latest crucial challenge: how to deal with manifestly irregularly appointed 'judges'. To understand the unprecedented and complex nature of this problem, an analysis of the Court's judgment of 2 March 2021 in Case C-824/18, *AB et al. (Appointment of judges to the Supreme Court – Actions)* – the most important judgment issued by the Court to date

regarding the extent to which EU law can be used to review *national* judicial appointment procedures and connected judicial review rules – is offered. *AB* is itself the Court of Justice’s third major judgment in a preliminary ruling case originating from a Polish court (in this instance, Poland’s Supreme Administrative Court) raising issues connected to Poland’s rule of law breakdown, out of a total of 37 (and counting) rule of law related national requests for a preliminary ruling submitted by Polish courts, compared to a total of four infringement actions lodged with the Court by the Commission to date. With so many preliminary cases remaining to be answered, one can expect the Court of Justice to provide further clarification on the extent to which EU law may be relied upon to deal with the situation of individuals appointed to judicial positions on the back of inherently deficient procedures which disclose an undue influence of the legislative and executive powers.

Following this largely chronological overview, the volume concludes with a transversal analysis of the core implications of the Court’s contribution to the fight against rule of law backsliding. While this includes identifying blind spots in the Court of Justices’ case law to date, the Court’s contribution amounts to one of the most important developments in the law of the Union since its foundational jurisprudence of the early 1960s. In other words, the multifaceted line of case law, which was prefigured by the Court’s interim order in *Białowieża Forest* before being fully exposed in the Court’s judgment in *Portuguese Judges*, has led to a deep renewal of the most essential features of EU’s constitutionalism. This renewal occurred through the articulation of a more substantive idea of the rule of law at the supranational level backed by the judicial ‘activation’ of the until then untapped potential of Article 19(1) TEU – an operationalisation of the EU principle of effective judicial protection fully justified and grounded in the Treaties – for the Court of Justice to intervene in defence of a core and well-established component of the rule of law: the principle of judicial independence.

In addition to the emergence of increasingly detailed standards of judicial independence binding on the Member States, these developments have resulted in upgrading the very nature of the judicial dialogue between the Court of Justice and the national courts. Essentially, the values of the EU are moving to the realm of the law, turning the Union into a true constitutional system where the rule of law and its core components have become an enforceable part of EU law, paving the way to the progressive ‘unification’ of European judicial power on the basis of fundamental principles that are binding and enforceable at both national and EU levels. In presiding over this development, the Court of Justice has reinforced the ‘values dimension’ of the EU, which now complements the internal market dimension of the EU construct.

1 Introduction

The European Court of Justice (ECJ) is behind a recent and genuine enhancement of European constitutionalism, placing at the centre stage the rule of law, a long-established value and principle of EU law.¹ This rule of law-enhancing process of re-articulation of EU constitutionalism is ongoing and represents the Court's response to the process of rule of law backsliding, now approaching breaking point, which first emerged in Hungary in 2010 before spreading to Poland in 2015.²

In this casebook-style study, we aim to present and critically analyse this ongoing development on a case-by-case basis. In other words, the primary aim of this volume is to offer in a casebook format both a digest and a critical assessment of the Court of Justice's most important judgments and orders, which have reshaped the meaning and scope of the rule of law principle since 2018: that is, from the point that the *Portuguese Judges* case was decided.³ This judgment can be viewed as belonging to the Pantheon of the most significant ECJ rulings, on a par with *Van Gend en Loos* and *Costa*.⁴ Indeed, it marked a new beginning for the rule of law as a fundamental *and* enforceable value of the EU legal order, referred to in Article 2 TEU and given concrete *and* justiciable expression by inter alia the second subparagraph of Article 19(1) TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

We hope that the selected excerpts from the Court's orders and judgments and the associated critical analysis presented in this casebook-style volume will help readers quickly appreciate the importance and the added value of the Court's orders and judgments, both individually and as a whole. What follows

¹ L. Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review* 359.

² L. Pech and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3. For an analysis focusing on the politics of democratic and rule of law backsliding in Europe, see R.D. Kelemen, 'The European Union's authoritarian equilibrium' (2020) 27 *Journal of European Public Policy* 481.

³ Case C-64/16 *Associação Sindical dos Juízes Portugueses (Portuguese Judges)*, EU:C:2018:117. The only temporal exception we will make in this volume concerns the Order of the Court (Grand Chamber) of 20 November 2017 in Case C-441/17 R *Commission v. Poland (Białowieża Forest)*, EU:C:2017:877. While strictly speaking not a judicial independence case, the ground-breaking interim order adopted by the Court in the *Białowieża Forest* case was explicitly grounded on the need to more effectively defend the rule of law in the face of deliberate non-compliance and prefigured the Court's 'activation' of Article 19(1) TEU in Case C-64/16 to better protect judicial independence.

⁴ On Case 26/62 and Case 6/64, see the contributions assembled by M. Poiras Maduro and L. Azoulai (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010).

is essentially a dynamic engagement with EU's legal history in the making: as the story progresses, a clear picture will emerge of how the Court of Justice is building, brick-by-brick, a renewed set of principles and standards to help EU institutions and national courts more effectively defend the rule of law, primarily in its dimension of judicial independence.

The Court's increasing and sustained focus on judicial independence is of course directly connected and indeed may be viewed as a direct response to an unprecedented phenomenon, at least in the EU until a decade ago, of democratic and rule of law backsliding in several EU Member States, with Viktor Orbán's Hungary and Jarosław Kaczyński's Poland being respectively exhibit A and exhibit B.⁵ In the absence of prompt, forceful and effective reactions from the European Commission and the Council of the EU, the European Court of Justice has essentially been left with no choice but to come to the rescue of national courts and judges primarily on the back of national requests for a preliminary ruling. Since doing so, starting with *Portuguese Judges* which, in turn, led the Commission to launch a (meagre) total of four infringement actions in relation to Poland's rule of law breakdown,⁶ the Court has achieved significant success, as this study will demonstrate. The Court has particularly focused its attention on the principle of judicial independence. This is a very logical choice, both in terms of jurisdiction and in terms of substance. As noted by the President of the Court of Justice, writing extra-judicially

given that the principle of judicial independence stems from the constitutional traditions common to the Member States as one of the founding tenets of any

⁵ In addition to Pech and Scheppele, 'Illiberalism within', op. cit., see also G. Halmi, 'The rise and fall of constitutionalism in Hungary' in P. Blokker (ed.), *Constitutional Acceleration within the European Union and Beyond* (Routledge, 2018), 217; P. Bárd and L. Pech, *How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The 'Hungarian model'*, RECONNECT Working Paper no. 4, October 2019; W. Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP, 2019); M. Smith, 'Staring into the abyss: A crisis of the rule of law in the EU' (2019) 25 *European Law Journal* 563; K. Kovács and K.L. Scheppele, 'The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union', in P.H. Solomon Jr. and K. Gadowska (eds), *Legal Change in Post-Communist States: Progress, Reversions, Explanations* (Stuttgart: Ibidem Verlag, 2019), 55; O. Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) 11 *The Hague Journal of the Rule of Law* 133. A number of scholarly volumes on these developments are also available: see e.g. A. von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Berlin: Springer, 2021); A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: OUP, 2017); T. Konstadinides, *The Rule of Law in the European Union – The Internal Dimension* (Oxford: Hart Publishing, 2017); C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016); W. Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing, 2016); A. von Bogdandy, P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015).

⁶ L. Pech, P. Wachowicz and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

democratic system of governance, it was assumed that national governments would not threaten it. That principle was “uncontested and incontestable.” It was taken as read that national governments would encourage citizens to trust the courts as the ultimate arbiters of any legal dispute, including in situations when a court ruling opposed the political majority of the day [...] Recent developments show that this assumption cannot simply be taken for granted.⁷

Faced with what may be viewed as an existential threat to the functioning and long-term survival of the EU legal order,⁸ the Court of Justice has had to mobilise the fundamental values and principles on which the Union and the Member States are built⁹ to progressively articulate a more comprehensive, coherent, and effective system of rule of law protection.¹⁰

What can be viewed as amounting to a ground-breaking turn in the history of EU law was arguably prefigured by a seminal order of the Court issued the year before *Portuguese Judges* in the *Białowieża forest* case,¹¹ which is why we have decided to make an exception and include an analysis of this pre-*Portuguese Judges* development in this volume. Faced with an unprecedented act of defiance with

⁷ K. Lenaerts, ‘New Horizons for the Rule of Law Within the EU’ (2020) 21 *German Law Journal* 29, 30–31.

⁸ L.S. Rossi, ‘La valeur juridique des valeurs: L’article 2 TEU’ (2020) 3 *Revue trimestrielle de droit européen* 639; D. Kochenov, ‘The EU and the Rule of Law – Naïveté or a Grand Design?’ in M. Adams, E. Hirsch Ballin, A. Meuwese (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge: CUP, 2017), 425.

⁹ B. Grabowska-Moroz, ‘Critical Discussion of the Rule of Law in the EU’ (2021) RECONNECT Deliverable 7.4: <<https://reconnect-europe.eu/publications/deliverables/>>; M. Klamert and D. Kochenov, ‘Article 2 TEU’, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford: OUP, 2019), 22; T. von Danwitz, ‘Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ’ (2018) 21 *Potchefstroom Electronic Law Journal* 2; D. Kochenov, ‘The Acquis and Its Principles: The Enforcement of ‘Law’ versus the Enforcement of ‘Values’ in the European Union’, in A. Jakab and D. Kochenov (eds) *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 8.

¹⁰ For further analysis, see e.g. T.T. Konciewicz, ‘The Supranational Rule of Law as First Principle of the European Public Space – On the Journey in Ever Closer Union among the Peoples of Europe in Flux’ (2020) 5 *Palestra* 167; K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, after All’ (2020) 39 *Yearbook of European Law* 3; P. Van Elsuwege and F. Grimmelprez, ‘Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice’ (2020) 16 *European Constitutional Law Review* 8; C. Rizcallah and V. Davio, ‘L’article 19 du Traité sur l’Union européenne: sesame de l’Union de droit’ (2020) *Revue trimestrielle des droits de l’homme* 122, 156; G. Kelepouri, ‘Revisiting the Rule of Law in the European Context: The CJEU’s Recent Narrative in the Limelight’ (2020) *European Politeia* 71; D. Kochenov and P. Bárd, ‘The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU’ (2019) 1 *European Yearbook of Constitutional Law* 243; K. Lenaerts, ‘Our Judicial Independence and the Quest for National, Supranational and Transnational Justice’, in G. Sevik, M.-J. Clifton, T. Haas, L. Lourenço and K. Schwiesow (eds), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Berlin: Springer, 2019), 155; S. Adam and P. Van Elsuwege, ‘L’exigence d’indépendance du juge, paradigme de l’Union européenne comme union de droit’ (2018) 9 *Journal de droit européen* 334; L. Pech and S. Platon, ‘Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case’ (2018) 55 *Common Market Law Review* 1836.

¹¹ Case C-441/17 R *Commission v. Poland (Białowieża forest)*, EU:C:2017:877.

Polish authorities publicly announcing that they would simply refuse to comply with a Court's previous interim order, the Court responded in November 2017 by stressing that the effective application of EU law is an essential component of the rule of law and ordering the payment of a penalty of at least €100,000 per day should the relevant Member State fail to immediately and fully comply with the Court's order. In other words, the Court responded to an unprecedented challenge to the rule of law (and its own authority) with an unprecedented but justified and warranted 'upgrading' of the EU system of remedies which prefigured what the Court would decide in future interim relief cases in relation to more deliberate and direct attacks on judicial independence originating from Polish authorities. While the Court's interim order in *Białowieża forest* was arguably radical, it was not directly connected to judicial independence, and it was not until 2018 that the Court of Justice made it unambiguously clear to all its interlocutors that it would not stand idle while 'the independence of the judiciary is being severely threatened, and the separation of powers between the executive branch and the judicial branch is being dismantled.'¹²

In the seminal case informally known as *Portuguese Judges*,¹³ the Court established a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals on the basis of a combined reading of Article 19(1) TEU and Articles 2 and 4(3) TEU. In doing so, the Court brought about a renewed understanding of the most essential principles of EU law – covering procedural and substantive issues – and their place in the legal-political architecture of the Union. As observed by one of the present authors writing with Sébastien Platon

the Court's ruling is reminiscent of the 1925 US judgment of *Gitlow v. New York*, in which the Supreme Court held that the Fourteenth Amendment to the US Constitution had extended the reach of certain limitations on federal government authority set forth in the First Amendment to the governments of the individual States. In the instant case, one may argue that the Court has essentially made the EU principle of effective judicial protection (including the principle of judicial independence) a quasi-federal standard of review which may be relied on before national courts in virtually any situation where national measures target national judges who may hear actions based on EU law.¹⁴

¹² Letter to the President-Elect of the European Commission from the president of the Network of Presidents of the Supreme Courts of the EU; The president of the European Association of Judges; and The president of the European Network of Councils for the Judiciary, Brussels, 20 September 2019: <https://www.encj.eu/node/535>.

¹³ Case C-64/16 *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

¹⁴ L. Pech and S. Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP Case*' (2018) 55 *Common Market Law Review* 1836, 1847.

The Court's decisive contribution to the fight against rule of law backsliding brought about by the *Portuguese Judges*' ruling and its progeny, which saw the Court finally giving flesh to the strong and multi-layered legal mandate previously given to the EU to defend the rule of law, in particular in Article 19(1) TEU,¹⁵ is multifaceted. It includes a profound strengthening of the EU Member States' obligations in the area of judicial independence via the progressive crystallisation of a renewed and more detailed substantive understanding of the principle of judicial independence, a component of which (irremovability of judges) has since acquired the nature of a principle of 'cardinal importance'; a much stricter understanding of basic EU law concepts such as the concept of a 'court or tribunal of a Member State'; the possibility of a stricter enforcement of the rule of law with a renewed emphasis on interim measures and last but not least, the explicit consecration of a principle of non-regression – also described as a principle of EU law connected to Article 19(1) TEU and prohibiting rule of law backsliding – in the March 2021 judgment which we will refer to as the *Maltese Judges* ruling.¹⁶ As observed by one of the present authors writing with Aleksejs Dimitrovs

One of the immediately apparent flaws of the legal-political organization of European Union enlargements consisted in the so-called 'Copenhagen dilemma': EU's inability to reshape the legal-political developments in the Member States falling outside the material scope of EU law post accession date [...] By proclaiming an entirely new 'non-regression' principle in EU law based on the connection between Articles 49 TEU (EU Enlargement) and 2 TEU (EU values ...), the Court of Justice achieved huge progress in addressing a well-known lacuna undermining the EU legal order.¹⁷

La boucle est bouclée, so to speak, with the Court of Justice taking just about three years – the *Portuguese Judges* ruling was issued on 27 February 2018 and the *Maltese Judges* ruling issued on 20 April 2021 – to provide the European Commission

¹⁵ C. Hillion, 'Overseeing the Rule of Law in the EU: Legal mandate and means', in C. Closa and D. Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016), 59.

¹⁶ Case C-896/19, *Repubblika v. Il-Prim Ministru*, EU:C:2021:31.

¹⁷ D. Kochenov, A. Dimitrovs, 'Solving the Copenhagen Dilemma: The *Repubblika* Decision of the European Court of Justice', *VerfBlog*, 28 April 2021: <<https://verfassungsblog.de/solving-the-copenhagen-dilemma/>>; M. Leloup, D. Kochenov and A. Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*' (2021), 46 *European Law Review* 668. While non-regression is new in the EU rule of law area, it was already implicit in the Court's *Portuguese Judges* ruling in which the Court emphasised the EU law obligation to maintain, that is, not to reduce, existing guarantees relating to judicial independence. It is also a well-established principle in other areas such as constitutional law or environmental law. Coincidence or not, shortly after the *Maltese Judges* ruling, the European Parliament gave its consent to the EU-UK Trade and Cooperation Agreement, [2021] OJ L 149 64/10, which includes several non-regression provisions as regards for instance labour and social levels of protection. See also A. Dimitrovs and D. Kochenov, 'Of Jupiters and Bulls: CVM as a Redundant Special Regime of the Rule of Law – *Romanian Judges*', *EU Law Live (Weekend edition)* 5 June 2021.

with all the legal ‘ammunition’ it needs to bring infringement actions against backsliding authorities to defend judicial independence and sanction violations of this principle. Indeed, the Court’s rule of law case law has resulted in:

- (i) An explicit confirmation that while the organisation of justice in the EU Member States falls within the competence of those Member States, this competence cannot be exercised in a way which violates EU law and in particular *the obligation* which flows from the second paragraph of post Lisbon Article 19(1) TEU *to ensure that their national courts meet the requirements essential to effective judicial protection* in the ‘fields covered by Union law’ (thereby confirming that the ECJ’s jurisdiction under this provision is not limited to situations where Member States are implementing EU law), which also necessarily implies another *obligation for the EU*, and especially the Commission, to proactively defend the independence of the national judiciaries and the rule of law via infringement actions and all available other means;¹⁸
- (ii) An articulation of a clearer *substantive understanding of the rule of law as a foundational value and a meta-principle of EU law*, which is furthermore fully in line with the dominant understanding of the rule of law one may derive from most national legal systems in Europe not to forget the understanding adopted and promoted by the Council of Europe.¹⁹ This contrasts with the initial and arguably primarily procedural and, ultimately, circular understanding of the rule of law put forward in *Les Verts*²⁰ at the earlier stage of EU constitutionalism;²¹
- (iii) A ‘widening’ and ‘deepening’ of the principle of *judicial independence*, some sub-components of which now being seen as having ‘cardinal importance’²² such as the principle of the *irremovability of judges*,

¹⁸ K.L. Scheppelle, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, after All’ (2020) 39 *Yearbook of European Law* 3.

¹⁹ L. Pech and J. Grogan (eds), ‘Meaning and Scope of the EU Rule of Law’ (2020) RECONNECT Deliverable 7.2: <<https://reconnect-europe.eu/publications/deliverables/>>

²⁰ Case 294/83 *Parti écologiste ‘Les Verts’ v. European Parliament*, EU:C:1986:166. For an analysis of this judgment and its importance as regards the rule of law as a constitutional principle of EU law, see K. Lenaerts, ‘The Basic Constitutional Charter of a Community Based on the Rule of Law’, in M. Poiras Maduro and L. Azoulay (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 304; L. Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) *Jean Monnet Working Papers* No. 4/2009; M.L. Fernández Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999).

²¹ D. Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2019) 34 *Yearbook of European Law* 74.

²² See e.g. Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2018:1021, para. 79.

with the fundamental right to a fair trial also described by the Court as a right which is of cardinal importance which is intrinsically connected to independent courts;

- (iv) A much *stricter understanding* of basic yet key notions such as, most importantly, the notion of a '*court or tribunal*' of a Member State for the purposes of the preliminary reference procedure and the notion of '*judicial authority*' for the purposes of the issuance of European Arrest Warrants;
- (v) A more *tightened enforcement* of the rule of law, in particular via infringement actions, including applications for interim measures, which however remains to date insufficiently prompt and sustained to effectively tackle the worsening rule of law backsliding in Poland in particular;²³
- (vi) The making explicit of a *principle of non-regression* on the basis of a joint reading of Articles 2 and 49 TEU, which, as the Court had repeatedly explained before the *Maltese Judges* ruling, means that the EU is composed of countries which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU. This means inter alia that a Member State cannot post accession adopt rules undermining judicial independence as this would violate the second subparagraph of Article 19(1) TEU which prohibits inter alia national authorities from adopting new legislation amounting to a regression in the Member State concerned in the protection of the value of the rule of law, in particular the EU guarantees relating to judicial independence.²⁴

Taken together, all of these developments amount in our view to welcome and crucial progress in the field of the rule of law: the Court of Justice has compellingly and repeatedly made crystal clear, as laid down in the Treaties, that the EU and its law are and must be based on the rule of law, a core binding *legal* principle rather than a non-binding political ornament. Equally importantly, the enforcement of the rule of law at Member State level is also a matter of *EU law*.

The above developments allow for the progressive emergence of a renewed Union. It is no longer a would-be constitutional system²⁵ based on an irrebuttable presumption of compliance with the values laid down in what is now Article

²³ L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

²⁴ Case C-896/19, *Repubblika v. Il-Prim Ministru*, EU:C:2021:31, paras 63–65.

²⁵ See, the diverging perspectives of J.H.H. Weiler, *The Constitution for Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge: CUP, 1999) and P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (Oxford: OUP, 2010).

2 TEU – including democracy, human rights protection and the rule of law.²⁶ Instead, these core foundational and shared values are now backed with the possibility of stricter substantive enforcement through the EU’s institutional framework and system of remedies,²⁷ with the Court, as noted above, confirming in 2021 that EU Law prohibits post accession regression when it comes to the rule of law and in particular the independence of national judges. By also confirming the obligation for every Member State under Article 19(1) TEU to ensure that their national courts are in a position to ensure effective judicial protection in the fields covered by EU law, the Commission had to move away from its pre-*Portuguese Judges*’ reluctance to directly enforce this obligation via infringement actions. This reluctance was arguably connected to the perceived limits of EU *competence*²⁸ combined with the perceived lack of clarity in terms of the *substance* of the values in question. Clarity is being articulated at both levels now.²⁹ With the simultaneous reinforcement of *enforcement* possibilities, the broad outlines of the nascent new constitutionalism in the EU are complete.³⁰

Renewed attention to the rule of law and its elevation to an enforceable principle of EU law applicable across the legal orders is likely to be the most important legacy of Koen Lenaerts – first appointed judge at the EU General Court in 1989, before being appointed judge at the Court of Justice in 2003 and elected President of the Court of Justice in 2015 – as he aspires to lead the Court in the ‘quest for national, supranational and transnational justice’.³¹

²⁶ D. Kochenov, ‘The EU and the Rule of Law – Naïveté or a Grand Design?’ in M. Adams, E. Hirsch Ballin, A. Meuwese (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge: CUP, 2017), 425.

²⁷ L.S. Rossi, ‘La valeur juridique des valeurs: L’article 2 TEU’ (2020) 3 *Revue trimestrielle de droit européen* 639; T. von Danwitz, ‘Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ’ (2018) 21 *Potchefstroom Electronic Law Journal* 2; R. Baratta, ‘La communauté de valeurs dans l’ordre juridique de l’Union européenne’ (2018) *Revue des affaires européennes* 81; D. Kochenov, ‘The *Acquis* and Its Principles: The Enforcement of ‘Law’ versus the Enforcement of ‘Values’ in the European Union’, in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 8.

²⁸ The European Commission did however and rightly interpret Article 7 TEU in 2003 as not being confined to areas covered by EU law, which means that the EU “could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously”. See Communication on Article 7 the Treaty on European Union, COM(2003) 606 final, 15 October 2003, p. 5.

²⁹ G. Palombella, ‘Beyond Legality—before Democracy: Rule of Law Caveats in the EU Two-Level System’, in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016).

³⁰ R. Janse, *De renaissance van de Rechtsstaat* (Open Universiteit, 2018).

³¹ K. Lenaerts, ‘Our Judicial Independence and the Quest for National, Supranational and Transnational Justice’, op. cit. This understanding goes hand in hand with the gradual articulation of best practices in the field of the rule of law in the EU: see B. Grabowska-Moroz, ‘Understanding the Best Practices in the Area of the Rule of Law’ (2020) RECONNECT Deliverable 8.1: <<https://reconnect-europe.eu/publications/deliverables/>>

As we embark on the analysis of the most crucial case law underpinning this quest, a disclaimer is needed to explain what could not be included in this already lengthy casebook, for reasons of framing and space:

First, and most importantly, justice, especially EU justice, is a multifaceted and troublesome concept, and scholars, including one of the present authors, have emphasised Europe's justice deficit and connected it to EU law's very nature, rather than the avenues of its enforcement *per se*.³² Secondly, we will not directly tackle the Court of Justice's arguable lack of consistency to date in applying and defending EU requirements relating to judicial independence in a situation where the mandate of a serving member of the Court was terminated prematurely on account of Brexit.³³

A supranational judiciary certainly requires wholehearted defence but also scrutiny, just like national ones do.³⁴ However, as noted above, this study is primarily about the Court of Justice's decisive contribution to a clearer, substantive and vertically integrated understanding of judicial independence in Europe as an indispensable part of the rule of law and a crucial factor behind the preservation of the unity of the multi-layered European legal system. These are painted here – albeit in broad strokes – with sufficient precision to hopefully help readers both appreciate the overall direction of the Court's rule of law case law as well as the added value of each of the Court's most important rulings.

To help readers appreciate the Court's 'voice' as well as its incrementalist approach, we have decided, as previously noted, to follow a casebook format. The Court's *Portuguese Judges* (Case C-64/16) ruling will be used as a starting point to discuss the extent of the EU Member States' obligation to ensure that their courts meet the requirements of effective judicial protection. The European Commission's enforcement of this obligation via application for interim measures³⁵ and infringements actions,³⁶ all relating to measures and (in)actions

³² D. Kochenov, G. de Búrca and A. Williams (eds), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015); A. von Bogdandy, 'Beyond the *Rechtsgemeinschaft*, with Trust – Reframing the Concept of European Rule of Law' (2018) *MPIL Research Paper* 2018/02. See also C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice, and the Cautionary Tale of the UK* (Oxford: Hart Publishing, 2017); D. Kochenov, 'On Tiles and Pillars', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2017); A. Williams, *The Ethos of Europe* (Cambridge: CUP, 2009); A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies* 549.

³³ D. Kochenov and G. Butler, 'The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution' [2020] *Jean Monnet Working Papers* No. 2/2020; D. Kochenov and G. Butler, 'CJEU's Independence in Question (Part V)', *VerfBlog* 19 June 2021; L. Pech, 'The Schrödinger's Advocate General,' *VerfBlog*, 29 May 2020: <<https://verfassungsblog.de/the-schroedingers-advocate-general>>

³⁴ A. Alemanno and L. Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System' (2017) 54 *Common Market Law Review* 129.

³⁵ Case C-441/17 R; Case C-619/18 R; Case C-791/19 R and Case C-204/21 R.

³⁶ Case C-192/18; Case C-619/18; Case C-791/19.

involving current Polish authorities, will then be presented before an analysis of the Court of Justice's answer to selected Polish courts' requests for a preliminary ruling is offered.³⁷ The casebook will then leave Polish related cases provisionally aside to focus on the Court of Justice's recalibration of its previous approaches in several domains such as the notion of court and tribunal for the purposes of Article 267 TFEU and offer a critical overview of seven judgments.³⁸ The Court of Justice's latest crucial challenge – how to deal with Poland's 'fake judges' – will be the last issue covered by this casebook before a transversal, concluding overview is offered.

We do hope that this study's casebook format will facilitate a better understanding of the importance of both the individual cases – and eventual shortcomings of the selected judgments or orders – and the case law, which has been evolving at lightning speed notwithstanding the Court's incrementalist approach as previously noted. In doing so, we hope to have answered, at least in part, the European Commission's call for academics to 'play a part by ensuring a place for the rule of law in public debate and educational curricula',³⁹ and help promote the standards developed in the Court of Justice's case law, bringing a stronger and more coherent system of EU law to life.

³⁷ Joined Cases C-585/18, C-624/18 and C-625/18; Joined Cases C-558/18 and C-563/18.

³⁸ Case C-274/14; Case C-416/17; Case C-284/16; Joined Cases C-508/18 and C-82/19 PPU; Case C-509/18; Case C-216/18 PPU; Joined Cases C-542/18 RX-II and C-543/18 RX-II.

³⁹ European Commission communication, *Strengthening the rule of law within the Union. A blueprint for action*, COM(2019) 343 final, 6.

2 The obligation to ensure that national courts meet the requirements of effective judicial protection

Case C-64/16 *ASJP (Portuguese Judges)*

The Court of Justice's Grand Chamber ruling in *ASJP*, a case informally known as *Portuguese Judges*,⁴⁰ is arguably 'the most important judgment since *Les Verts* as regards the meaning and scope of the principle of the rule of law in the EU legal system'.⁴¹ This judgment may also be understood as 'the Court's first significant albeit indirect answer to the worrying and ongoing process of "rule of law backsliding", first witnessed in Hungary and now under way in Poland'.⁴²

The most significant outcome of this case is the Court's compelling interpretation of the second subparagraph of Article 19(1) TEU ('Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law') from which the Court derived a *general* and *justiciable* obligation for every Member State, not only to *guarantee* but also *maintain* the independence of their national courts and tribunals.⁴³

⁴⁰ EU:C:2018:117.

⁴¹ L. Pech and S. Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the *ASJP* case' (2018) 55 *Common Market Law Review* 1827, 1827. See also M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' (2018) 14 *European Constitutional Law Review* 622.

⁴² L. Pech and S. Platon, *ibid.*, 1828.

⁴³ A few days after the *Portuguese Judges* ruling, the ECJ made extensive references to it in yet another seminal ruling, in *Achmea*, which is analysed *infra* in Section 5.3.

JUDGMENT OF THE COURT (Grand Chamber)

27 February 2018

Case C-64/16

**REQUEST for a preliminary ruling under Article 267 TFEU from the
Supremo Tribunal Administrativo (Supreme Administrative Court,
Portugal)**

Associação Sindical dos Juizes Portugueses v. Tribunal de Contas

[For ease of reading, references to previous cases have been omitted]

Excerpts:

29 First of all, the Court of Justice points out that as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to ‘the fields covered by Union law’, irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.

30 According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premises that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU.

31 The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act.

32 Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.

33 Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed.

34 The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies

sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields.

35 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter.

36 The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.

37 It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.

38 In that regard, the Court notes that the factors to be taken into account in assessing whether a body is a 'court or tribunal' include, *inter alia*, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

39 In the present case, it must be noted that, according to the information before the Court which it is for the referring court to verify, questions relating to EU own resources and the use of financial resources from the European Union may be brought before the Tribunal de Contas (Court of Auditors) [...]

40 Consequently, to the extent that the Tribunal de Contas (Court of Auditors) may rule, as a 'court or tribunal', within the meaning referred to in paragraph 38 above, on questions concerning the application or interpretation of EU law, which it is for the referring court to verify, the Member State concerned must ensure that that court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU.

41 In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.

42 The guarantee of independence, which is inherent in the task of adjudication, is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19(2) TEU, but also at the level of the Member States as regards national courts.

43 The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence.

44 The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

45 Like the protection against removal from office of the members of the body concerned, the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.

46 In the present case, it should be noted that, as is apparent from the information provided by the referring court, the salary-reduction measures at issue in the main proceedings were adopted because of mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit and in the context of an EU programme of financial assistance to Portugal.

[...]

48 The measures were applied not only to the members of the Tribunal de Contas (Court of Auditors), but, more widely, to various public office holders and employees performing duties in the public sector, including the representatives of the legislature, the executive and the judiciary.

49 Those measures cannot, therefore, be perceived as being specifically adopted in respect of the members of the Tribunal de Contas (Court of Auditors). They are, on the contrary, in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort dictated by the mandatory requirements for reducing the Portuguese State's excessive budget deficit.

[...]

51 In those circumstances, the salary-reduction measures at issue in the main proceedings cannot be considered to impair the independence of the members of the Tribunal de Contas (Court of Auditors).

Analysis

The answer provided by the European Court of Justice to the referring national court may seem, at first sight, rather innocuous, as the Court merely concluded that ‘the second subparagraph of Article 19(1) TEU must be interpreted as meaning that the principle of judicial independence does not preclude’ the general salary-reduction measures adopted by Portuguese authorities to eliminate an excessive budget deficit from being applied to the members of the Portuguese Court of Auditors. Advocate General (‘AG’) Saugmandsgaard Øe had previously concluded the same. He however did so on the dual basis of the second subparagraph of Article 19(1) TEU and Article 47 of Charter of Fundamental Rights of the EU (‘CFR’), while also opining on the one hand that the principle of judicial independence is not directly protected by Article 19(1) TEU and, on the other hand that the dispute before the referring court did *not* in fact relate to judicial independence as such.⁴⁴ The reasoning adopted by the Court of Justice to reach the same conclusion was radically different and we would submit, rightly so.⁴⁵

⁴⁴ Opinion of Advocate General Saugmandsgaard Øe delivered on 18 May 2017 in Case C-64/16, EU:C:2017:395.

⁴⁵ While ground-breaking, the Court’s interpretation in this case is less revolutionary than it may seem at first sight. Indeed, it is solidly rooted both in the Court’s previous case law (see Case C-50/00 P *Unión de Pequeños Agricultores*, EU:C:2002:462) and in the academic literature: see in particular the remarkable work of John Usher regarding the predecessor of Article 19(1) TEU, i.e., Article 164 EEC. Professor Usher opined that ‘the door appears to have been opened to the exercise of new sorts of judicial control in the complex relationship between Community institutions and Member States, going beyond the broad interpretation which the Court had already given under the Treaties’: J.A. Usher, ‘General Course: The Continuing Development of Law and Institutions’, in F. Emmert, *Collected Courses of the Academy of European Law* (1991) European Community Law. Vol II, Book 1 (The Hague: Martinus Nijhoff Publishers, 1992), esp. Part v. ‘The European Court of Justice and its Jurisdiction’, 122–135; J.A. Usher, ‘How limited is the jurisdiction of European Court of Justice?’, in J. Dine, S. Douglas-Scott, I. Persaud (eds), *Procedure and the European Court* (London: Chancery Law Publishing 1991), 77. See also C.N. Kakouris, ‘La Cour de Justice des Communautés européennes comme cour constitutionnelle: trois observations’, in O. Due, M. Lutter, J. Schwarze (eds), *Festschrift für Ulrich Everling* (Baden Baden: Nomos, 1995), 629; C.N. Kakouris, ‘La Mission de la Cour de Justice des Communautés Européennes et l’ethos du Juge’ (1994) 4 *Revue des affaires européennes* 35, all as cited in L. Pech and J. Grogan (eds), *The Meaning and Scope of EU Rule of Law* (2020) RECONNECT Deliverable 7.2., at 20 et seq. See also supporting this view, K. Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 *Common Market Law Review* 1625; C. Closa, D. Kochenov and J.H.H. Weiler, ‘Reinforcing the Rule of Law Oversight in the European Union’, *EUI RSCAS Working Paper No. 2014/25*, 19–13; K. Lenaerts, ‘The Court of Justice as the Guarantor of the Rule of Law within the European Union’, in G. De Baere and J. Wouters (eds), *The Contribution of International and Supranational Courts to the Rule of Law* (Cheltenham: Edward Elgar, 2015), 242.

Before outlining the key aspects of the Court's reasoning, one should note that the European Commission, rather than arguing for a rule of law-enhancing interpretation of Article 19(1) TEU, thought it best to raise objections as regards the admissibility of the request for a preliminary ruling. Indeed, the Commission argued that the national legislation at issue was *not* a measure implementing EU law within the meaning of Article 51 CFR and, as such, was *not* a measure which could be reviewed in light of Article 19(1) TEU. The Court disagreed.

Before outlining the most ground-breaking elements of the Court's reasoning, the basic principles recalled by the Court will be briefly presented.

Well-established principles prior to Portuguese Judges

When dealing with the substance of the question submitted by the referring court, the Court first mostly reiterates well-established principles: The EU is established on a number of fundamental and common values and its legal order is based on the assumption that EU Member States will comply with values. The Court then makes a number of basic points which are nonetheless worth repeating:

- (i) The rule of law in the EU essentially means that individuals have the right to judicially challenge EU measures but also national measures which relate to EU law;
- (ii) Responsibility for ensuring judicial review is entrusted not only to the EU courts but also to national courts and tribunals;
- (iii) Member States are under an obligation to apply and respect EU law and it is their responsibility to establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law;
- (iv) The principle of the effective judicial protection of individuals' right under EU law is a general principle of EU law;
- (v) Effective judicial review designed to ensure compliance with EU law is the essence of the rule of law;
- (vi) The independence of national courts and tribunals is essential to the proper working of the EU judicial cooperation system;
- (vii) The concept of judicial independence has an internal dimension (which is primarily about guaranteeing impartiality) as well as an external dimension (which is primarily about protecting judges against external interventions or pressures).

These broad and well-established principles are subsequently relied upon by the Court to guide its interpretation of the second subparagraph of Article 19(1) TEU, which – one must recall – was introduced by the Lisbon Treaty.⁴⁶ According to the Court, the second subparagraph of Article 19(1) TEU establishes a justiciable obligation for every Member State to ‘ensure that the bodies which, as “courts or tribunals” within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection’.⁴⁷ This obligation includes not merely an *obligation to respect* but also an *obligation to maintain* the independence of national courts or tribunals. This twofold obligation is connected with and derives from the right of access to an independent tribunal laid down in the second subparagraph of Article 47 CFR but also Article 2 TEU, with Article 19(1) TEU appropriately described as giving *concrete* expression to the principle of the rule of law.

Scope of application

The scope of application of the second subparagraph of Article 19(1) TEU and the scope of application of the second subparagraph of Article 47 CFR must however be distinguished, as Article 19(1) TEU refers to the notion of ‘fields covered by Union law’ whereas Article 51 CFR refers to the notion of implementation of Union law as far as the Member States are concerned.⁴⁸ For the Court, the material scope of application of the obligation to protect judicial independence laid down in the second subparagraph of Article 19(1) TEU is broader than the right to an independent tribunal laid down second subparagraph of Article 47 CFR.⁴⁹ Indeed, the second subparagraph of Article 19(1) TEU covers any national court or tribunal which may rule as a court or tribunal on questions concerning the application or interpretation of EU law. Matteo Bonelli and Monica Claes have aptly referred in this context to the emergence of a new ‘functional’ sphere of EU law:

The new sphere of EU law seems to be a ‘functional’ rather than a traditional ‘substantive’ one: the key factor for falling under the jurisdiction of the Court is not whether the circumstances of the case touch upon matters regulated by Union law, but the function of national courts as part of the European judiciary. A link

⁴⁶ In doing so, the Lisbon Treaty merely codified the Court’s case law. See in particular Case C-50/00 P *Unión de Pequeños Agricultores*, EU:C:2002:462, para. 41: ‘it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection’. For further analysis, see M. Klamert and B. Schima, ‘Article 19’ in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford: OUP, 2019), 172; K. Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 *Common Market Law Review* 1625.

⁴⁷ Case C-64/16 *Associação Sindical dos Juizes Portugueses*, op. cit., para 37.

⁴⁸ *Ibid.*, para. 29.

⁴⁹ This distinction, while compelling, can however have negative implications if a CFR route for the protection of the rule of law is chosen, as could be observed in Case C-216/18 PPU *LM*, for example, which is analysed *infra* in Section 5.5.

with a ‘substantive rule of EU law’ is thus still required, but it can be more indirect; it is sufficient for the relevant court to ‘potentially apply or interpret EU law’.⁵⁰

This complex issue has been tackled directly by the Court in the cases of *Miasto Łowicz and Prokurator Generalny*,⁵¹ which we analyse *infra* in Section 4.2. At this stage, let us emphasise that the practical, if not far-reaching, consequence of the Court’s interpretation in *Portuguese Judges* is that private parties, in particular judges when acting as plaintiffs, have been empowered to rely upon the second subparagraph of Article 19(1) TEU directly to challenge, in the context of domestic proceedings, national measures which can be considered to undermine the independence of any national court or tribunal which may apply or interpret EU law. And while the Court of Justice only initially implicitly recognised that the second subparagraph of Article 19(1) TEU has direct effect, the Court has recently explicitly confirmed that this is indeed the case in *A.B. and Others*, by holding that ‘the second subparagraph of Article 19(1) TEU imposes on the Member States a clear and precise obligation as to the result to be achieved and [...] that obligation is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law’.⁵² In other words, and to quote AG Bobek, ‘that provision is endowed with direct effect and thus entitles a national court, by virtue of the principle of primacy of EU law, to do whatever is in its power to secure the compliance of national law with EU law’.⁵³ The *Portuguese Judges* ruling also finally convinced the Commission to launch infringement actions directly on the basis of Article 19(1) TEU, which the Commission did soon afterwards.⁵⁴

⁵⁰ M. Bonelli and M. Claes, ‘Judicial serendipity’, op. cit., 631. See also M. Krajewski, ‘*Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma*’ (2018) 3 *European Papers* 395.

⁵¹ Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234.

⁵² Case C-824/18 *A.B. et al. (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153. For further analysis, see *infra* Section 6.

⁵³ Opinion of AG Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim et al.*, EU:C:2021:403, para. 196.

⁵⁴ See Case C-192/18 *Commission v. Poland (Independence of Ordinary Courts)*, EU:C:2019:924 and Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2018:1021 where the Commission requested the Court, *inter alia*, to declare a violation of the second subparagraph of Article 19(1) TEU, read in the light of Article 47 CFR, and analysed *infra* in Section 3.2. This approach had been previously advocated by K.L. Scheppelle, C. Hillion, and the present authors: See e.g. D. Kochenov and L. Pech, ‘Better late than never: On the European Commission’s Rule of Law Framework and its first activation’ (2016) 54 *Journal of Common Market Studies*, 1062–1074, and Pech et al., ‘An EU mechanism on democracy, the rule of law and fundamental rights – Annex I (EPRS study)’ (2016) PE 579.328, 200 (use of infringement actions based on Article 2 TEU in conjunction with Articles 4(3) and/or 19(1) TEU is presented as one of the options the Commission should explore in order better to protect the rule of law in the EU); C. Hillion, ‘Overseeing the Rule of Law in the EU: Legal mandate and means’, in C. Closa and D. Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016); K.L. Scheppelle, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016). See also C. Closa, D. Kochenov and J.H.H. Weiler, ‘Reinforcing the Rule of Law Oversight in the European Union’ (2014) *EUI RSCAS Research Paper* 2014/25.

Challengeable national measures

As regards the type of national measures which could be challenged for violating the principle of judicial independence, the *Portuguese Judges* ruling clarified that any national measure of a financial nature which, for instance, would *specifically* target judges could be reviewed in light of Article 19(1) and would violate it should the measure be found to *impair* judicial independence. The Court similarly clarified that the principle of judicial independence may be relied upon to protect judges against financial measures such as pay cuts in a situation where judges are specifically targeted on the ground that ‘the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence’.⁵⁵

Subsequently to this judgment, the Court (second chamber) was asked by a Spanish court to review salary-reduction measures following litigation initiated by a Spanish judge.⁵⁶ Unsurprisingly, and in line with the answer provided in respect of the Portuguese general salary-reduction measures, the Court held that the disputed ‘measures were applied not only to the members of the Spanish judiciary but, more widely, to various public office holders and employees performing duties in the public sector’.⁵⁷ Due to their general nature, and in the absence of circumstances indicating the contrary, the Court found that the national legislation at issue did not give rise to an ‘infringement of the principle of judicial independence, as guaranteed by the second paragraph of Article 19(1) TEU’.⁵⁸

However, the Court added that it is for the referring court to ascertain whether the level of remuneration received by the applicant judge ‘after application of the salary reduction at issue is commensurate with the importance of the duties he performs and, accordingly, guarantees his independent judgment’.⁵⁹ This is a new and welcome qualification which implies that a Member State could still fall foul of Article 19(1) TEU in a situation where, for instance, under the pretext of reducing its public sector bill, national authorities aimed in fact to undermine the independence of national judges.⁶⁰

⁵⁵ Case C-64/16, op. cit., para. 45.

⁵⁶ The broader context of the case law on austerity measures predating *Portuguese judges* is also of interest. As Georgia Kelepouri rightly underlines, the ruling appears to be a reversal – concerning the judiciary – of the Court’s previous approach regarding national measures resulting in the lowering of salaries in the public sector. See G. Kelepouri, ‘Revisiting the Rule of Law in the European Context: The CJEU’s Recent Narrative in the Limelight’ (2020) *European Politeia* 71, at 75, note 5.

⁵⁷ Case C-49/18 *Carlos Escribano Vindel v. Ministerio de Justicia*, EU:C:2019:106, para. 67.

⁵⁸ *Ibid.*, para. 73.

⁵⁹ *Ibid.*, para. 74.

⁶⁰ A potential danger highlighted by Pech and Platon, op. cit., at 1851: ‘By making inter alia the specific targeting of judges part of its test to decide when a violation of the EU principle of judicial independence may be directly raised via Article 19(1) TEU, the Court leaves open one possible option for autocratic governments to annihilate judicial independence without activating Article 19(1): the option to act against all checks and balances simultaneously, for instance, by cutting their budgets all at once so that the judiciary is not singled out’.

Aspects left to be clarified by subsequent case law

A number of aspects remained unclear after the *Portuguese Judges* ruling: to begin with, the Court was relatively ambiguous when it came to the seemingly different scopes of application of the Article 19(1) TEU principle of judicial independence and the Article 47 CFR right to an effective remedy and to a fair trial. While the scope of Article 19(1) TEU is understood by the Court as broader than the scope of Article 47 CFR, the Court's ruling did not clarify how much broader it should be. Subsequent judgments examined *infra* have raised this issue and we will therefore discuss it again when analysing the Court's judgments in response to the Commission's infringement actions in respect of Poland's so-called 'judicial reforms'.⁶¹

Another area of uncertainty concerned the relationship between Article 19(1) TEU and Article 267 TFEU: 'Since Article 19(1) TEU empowers the Court to review whether a national measure affects the independence of most national courts, this raises the question of how this "Article 19(1) test" relates, if at all, to the "Article 267 test" (i.e., whether the body that made a request for a preliminary ruling is a "court or tribunal"). Is the latter likely to spill over to the former?'⁶² This issue was clarified to some extent in *Banco de Santander SA*,⁶³ where the Court tightened the minimal standards of independence necessary to be considered a court or tribunal for the purposes of Article 267 TFEU.⁶⁴

Some uncertainty also remained as regards the concrete situations in which the principle of judicial independence expressed in the second subparagraph of Article 19(1) TEU may be relied upon by litigants before national courts. In *Portuguese Judges*, the litigation was initiated by a union of judges who challenged salary-reduction measures which were directly applied to judges. It was left unclear to what extent, if at all, a national court could refer questions regarding national measures targeting the referring judges and/or undermining judicial independence structurally in the context of a domestic dispute pending before the national referring court when the dispute itself does not fall within the scope of EU law. In other words, it was unclear after the *Portuguese Judges* ruling whether the Court would accept responding to Article 19(1) TEU-related questions if the main national case did not itself fall within the scope of EU law, or whether the Court would admit such questions if the referring court raised the issue of 'incidental' national measures which affected the independence of

⁶¹ Most importantly, the Court did seem to imply in this later case law that Article 47 CFR can still be complied with – quite counter-intuitively – in specific individual cases even if the judiciary as a whole has been captured and that the executive and legislative powers can thus interfere with judicial output at will, as has been observed in *LM* and is analysed *infra* in Section 5.5.

⁶² Pech and Platon, *op. cit.*, at 1842.

⁶³ Case C-274/14 *Banco de Santander SA*, EU:C:2019:802.

⁶⁴ See *infra* Section 5.1.

a court which ‘could’ rule on EU law, even if the main case pending before that court were not itself connected with EU law? Some answers to these complex issues have since been provided by the Court, in particular in Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*, examined *infra* in Section 4.

To conclude, the Court’s seminal judgment in *Portuguese Judges* must be understood as being on par with the Court’s judgments in *Van Gend en Loos* and *Costa*. It is yet another *grande décision* which shows, to follow President Lenaerts, that ‘national courts are called upon to play a pivotal role in European integration, and that the ECJ is committed to upholding the rule of law within the EU’.⁶⁵ Subsequent judgments and orders have shown the strength of the Court of Justice’s commitment to play its part in defending the independence of national courts. Before reviewing the most significant preliminary rulings issued by the Court post *Portuguese Judges*, the next section will outline the decisive contribution to judicial independence made by the Court of Justice in the context of the infringement actions brought by the Commission against Polish authorities.

⁶⁵ K. Lenaerts, ‘Our Judicial Independence and the Quest for National, Supranational and Transnational Justice’, *op. cit.*, at 164.

3 Enforcement of the obligation to ensure that national courts meet the requirements of effective judicial protection

The European Commission, in its capacity as Guardian of the Treaties (Article 17(1) TEU), has launched a total of four infringement actions to protect judicial independence to date in relation to the rule of law situation in Poland. Three out of these four actions have been decided by the Court of Justice at the time of writing with the Court finding in each instance multiple violations of the Polish authorities' obligation to respect and maintain the independence of the Polish courts.⁶⁶

The developments below will offer an analysis of the Court's rulings in Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*; Case C-192/18, *Commission v. Poland (Independence of the ordinary courts)* and Case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*, in which Poland was the first EU Member State to be found to have violated the second subparagraph of Article 19(1) TEU three cases in a row. Before offering a critical analysis of these judgments on the merits issued in relation to Poland's so-called 'judicial reforms', often more accurately described as 'deforms', four interim reliefs orders will be reviewed. The first one, issued by the Court on 20 November 2017 to protect Białowieża Forest from unlawful logging, while seemingly not directly connected to Poland's rule of law crisis, may in fact be viewed as a key episode as it offered the first illustration of current Polish authorities' mounting disregard for the authority of the Court of Justice while also prefiguring the Court's subsequent and unprecedented orders in infringement actions directly concerned with the protection of judicial independence in Poland. As such, its inclusion in this Rule of Law casebook is warranted. As regards the order of the Court of 14 July 2021 issued within the framework of pending infringement Case C-204/21 which concerns Poland's 'muzzle law', yet another unconstitutional piece of legislation targeting independent Polish judges whose incompatibility

⁶⁶ See generally, L. Pech, P. Wachowicz and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

with EU membership is manifest,⁶⁷ it will be examined alongside the Court's order in Case C-791/19 R as they both primarily concern one of the new bodies created by Polish authorities which is known as the 'Disciplinary Chamber'.

Table 1 Commission v. Poland: Rule of law related infringement actions

<p>Case C-192/18 Independence of Ordinary Courts</p> <p>ECJ judgment (5 November 2019): New Polish retirement rules are incompatible with EU Law, including the principles of irremovability of judges and of judicial independence</p>	<p>Case C-791/19 Protecting Polish Judges from Political Control</p> <p>ECJ order (8 April 2020): Poland must immediately suspend the 'Disciplinary Chamber' with regard to disciplinary cases</p> <p>(Notwithstanding violation of ECJ order, Commission did not ask for penalty payment but submitted additional LFN/RO in 'Muzzle Law' action)</p> <p>ECJ judgment (15 July 2021): New disciplinary regime for judges / 'Disciplinary Chamber' is not compatible with EU Law</p>
<p>Commission v. Poland: Rule of law related infringement actions since January 2016*</p> <p>(total of 4 versus total of 37 national requests for a preliminary ruling (PR) originating from Poland)</p>	
<p>Case C-619/18 Independence of Supreme Court</p> <p>ECJ order (17 December 2018): Application of Polish legislation must be immediately suspended</p> <p>ECJ judgment (24 June 2019): Polish legislation concerning the lowering of retirement age of Supreme Court judges is incompatible with principles of irremovability of judges and of judicial independence</p>	<p>Case C-204/21 (pending) Safeguarding the Independence of Polish Judges post 'Muzzle law'</p> <p>ECJ order (14 July 2021): Poland must immediately suspend i.a. the 'Disciplinary Chamber' with regard to lifting of judicial immunity cases</p> <p>(ECJ expected to find the 'Muzzle Law' of 20 December 2019 incompatible with EU Law, including judicial independence, primacy of EU law & PR mechanism)</p>

* On 13 January 2016, the European Commission activated its 'Rule of Law Framework'.

⁶⁷ According to the Commission, the 'muzzle law' law of 20 December 2019 undermines the independence of Polish judges, is incompatible with the primacy of EU law and prevents Polish judges through various means – including the threat of disciplinary proceedings – from directly applying certain provisions of EU law protecting judicial independence and from putting references for preliminary rulings on such questions to the Court of Justice. The Commission subsequently added one more item to this fourth infringement action: the lifting of judicial immunity by the 'Disciplinary Chamber' whose disciplinary activities were supposed to have been suspended following the ECJ order of 8 April 2020 in Case C-791/19 R. See Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of Polish judges and asks for interim measures, IP/21/1524, 31 March 2021.

3.1 The Commission's applications for interim measures in respect of Poland's so-called 'judicial reforms'

In the past four years, the Grand Chamber of the Court of Justice has issued four far-reaching interim relief orders when faced with (i) an open and defiant violation of a previous order that the Court of Justice had issued in an environmental related case (Case C-441/17 R); (ii) an obvious attempt to 'purge' Poland's Supreme Court under false pretences (Case C-619/18 R); (iii) the manifest and deliberate violation by Polish authorities and their proxy allegedly judicial bodies of several rulings issued by Poland's Supreme Court in application of the Court of Justice's preliminary ruling regarding the so-called 'Disciplinary Chamber' (Case C-791/19 R); and (iv) the repeated abusive use of the procedure of lifting judicial immunity of critical judges by the supposedly already suspended Disciplinary Chamber on the back of criminal charges lacking any credibility (Case C-204/21 R). These orders have opened the way for a more effective protection of the rule of law, considering the shortcomings of Article 260 TFEU.⁶⁸ provided that the Commission is willing to make *full* and *prompt* use of Article 279 TFEU which provides as follows: 'The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures'.

3.1.1 Early warning in a non-judicial independence case: Case C-441/17 R *Commission v. Poland (Białowieża forest)*⁶⁹

In July 2017 the Commission decided to refer Poland to the Court of Justice and request interim measures due to increased logging in the Białowieża Forest, a protected site under EU law.⁷⁰ As soon as the Court of Justice provisionally granted the Commission's request for interim measures on 27 July 2017, Polish authorities, in what was then an unprecedented act of public defiance, bluntly indicated that they would not suspend logging notwithstanding the Court's order. As a consequence, the Commission requested the Court to order Poland to pay a periodic penalty payment should it fail to comply with the Court's orders. In its order of 20 November 2017, examined below, the Court, *for the first time*, agreed with the Commission's request and decided that Poland would

⁶⁸ Under Article 260 TFEU, in a situation where a Member State has failed to take the necessary measures to comply with an infringement judgment of the Court of Justice, the Commission may refer the matter to the Court and request financial sanctions. For further analysis, see e.g. B. Schima, 'Article 260', in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford: OUP, 2019), 1792; P. Wennerås, 'Making Effective Use of Article 260 TFEU' in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford: OUP, 2017); M. Smith, 'The Evolution of Infringement and Sanction Procedures. Of Pilots, Diversions, Collisions, and Circling', in A. Arnall and D. Chalmers (eds), *The Oxford Handbook of European Law* (Oxford: OUP, 2015), 350; B. Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgements?' (2013) 19 *European Law Journal* 404.

⁶⁹ EU:C:2017:877.

⁷⁰ The ancient forest is currently divided between Poland and Belarus. The forest as a whole is designated as a UNESCO World Heritage site: <<https://whc.unesco.org/en/list/33>>.

have to pay a penalty payment of at least €100,000 per day should it fail to immediately and fully comply with this order.⁷¹

ORDER OF THE COURT (Grand Chamber)

20 November 2017

In Case C-441/17 R

**APPLICATION for interim measures under Article 279 TFEU and
Article 160(2) of the Rules of Procedure of the Court of Justice**

European Commission v. Republic of Poland

[For ease of reading, references to previous cases have been omitted]

Excerpts:

102 It must, however, be stated that, first, a periodic penalty payment cannot, in the circumstances of the present case, be seen as a punishment and, second, the Republic of Poland's interpretation of the system of legal remedies under EU law in general, and of proceedings for interim measures in particular, would have the effect of considerably reducing the likelihood of those proceedings achieving their objective in the event of the Member State concerned failing to comply with the interim measures ordered against it. The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded.

103 Thus, while it is true that the scope of proceedings for interim measures under Article 279 TFEU is limited by their ancillary nature vis-à-vis the main action and by the provisional nature of the measures that may be adopted in those proceedings, a feature of that scope is nonetheless the breadth of the powers which are afforded to the Court hearing an application for interim measures in order to enable it to guarantee the full effectiveness of the final decision.

104 To that end, if the Court hearing an application for interim measures considers that the circumstances of the case require additional measures to

⁷¹ P. Wennerås, 'Saving a forest and the rule of law: Commission v. Poland. Case C-441/17 R, Commission v. Poland, Order of the Court (Grand Chamber) of 20 November 2017' (2019) 56 *Common Market Law Review* 541; L. Coutron, 'La Cour de justice au secours de la forêt de Białowieża' (2018) 4–6 *Revue trimestrielle de droit européen* 321; Editorial Comments, 'Winter Is Coming. The Polish Woodworm Games' (2017) 2 *European Papers* 797.

be taken in order to ensure the effectiveness of the measures requested, it has power under Article 279 TFEU, inter alia, to provide for a periodic penalty payment to be imposed on a Member State in the event that that Member State fails to comply with the interim measures ordered.

105 Since the prospect of a periodic penalty payment being imposed in such a situation encourages the relevant Member State to comply with the interim measures ordered, it enhances the effectiveness of those measures and guarantees the full effectiveness of the final decision, thus falling entirely within the ambit of the objective of Article 279 TFEU.

[...]

114 Having regard to the particular circumstances of the present case, and having explained, in paragraphs 81 and 82 of the present order, as requested by the Commission at the hearings of 11 September 2017 and 17 October 2017, the scope of the public safety exception, the Court therefore considers it necessary to enhance the effectiveness of the interim measures set out in the present order by providing for a periodic penalty payment to be imposed in the event of the Republic of Poland failing to comply immediately and fully with those interim measures, in order to deter it from delaying its compliance with the present order.

[...]

118 If there is found to be an infringement, the Court will order the Republic of Poland to pay to the Commission a periodic penalty payment of at least EUR 100 000 per day, from the date of notification of the present order to the Republic of Poland until such time as that Member State complies with this order or until final judgment in Case C-441/17 is delivered.

Analysis

This order may be understood as the first rule of law ‘warning’ given to the Polish authorities by the Court of Justice, hence its inclusion in the present casebook.⁷² However, the Court did so not in a case which directly raises judicial independence issues but in a case concerning an unlawful increase in logging in ‘one of the best preserved natural forests in Europe, characterised by large

⁷² D. Sarmiento, ‘Provisional (And Extraordinary) Measures in the Name of the Rule of Law’, *VerfBlog* 24 November 2017: <<http://verfassungsblog.de/provisional-and-extraordinary-measures-in-the-name-of-the-rule-of-law/>> (‘The showdown was inevitable. At some point, the Court of Justice had to show its teeth and remind the Polish government of its duty to comply with the rule of law and with the values enshrined in Article 2 TEU’).

quantities of dead wood and ancient trees, some of which are centuries old'.⁷³ Rather unexpectedly, it is in this context that the authority of the Court of Justice itself was, *for the first time*, directly and disrespectfully challenged by the Polish authorities at a time where Article 7(1) TEU had yet to be activated against them.

Significance of order

The Court of Justice's order of 20 November 2017 is significant both from a political and legal perspective. Politically speaking, it was widely noted at the time that no EU Member State had ever so openly defied the authority of the Court, in this case by straightforwardly and publicly ignoring the first order issued by the Vice-President of the Court of 27 July 2017,⁷⁴ requiring certain operations be temporarily suspended.⁷⁵ In doing so, Poland 'made it into the textbooks of European integration as the first member state'⁷⁶ to refuse to obey a Court's order.

Legally speaking, the order adopted by the Grand Chamber is also particularly noteworthy for the parallels it draws between Articles 260 and 279 TFEU, and its rule-of-law-based enhancing interpretation of the scope of Article 279 TFEU, which confers on the Court the power to prescribe 'any necessary interim measures' in cases pending before it. To guarantee the effective application of EU law, which is, *for the first time*,⁷⁷ directly connected to Article 2 TEU and referred to as 'an essential component of the rule of law',⁷⁸ the Court, *also for the first time*, held that it has the power to impose a periodic penalty payment on a Member State should this Member State fail to comply with the interim measure or measures being ordered.

⁷³ Case C-441/17 R *Commission v. Poland*, EU:C:2017:622, para. 22. As part of a PR campaign to justify the illegal logging, Poland organised an event at the European Parliament in Brussels, inviting a 'Roman Catholic priest Tomasz Duzkiewicz, who cited the Bible as having said that men should "subdue" the earth. He said the EU must base its decisions on the Biblical Ten Commandments otherwise it would "turn into dust"', as *EU Observer* reported: A. Ericsson, 'Poland Seeks Support for Logging in Ancient Forest', *EU Observer*, 1 September 2016: <<https://euobserver.com/environment/134841>>.

⁷⁴ Case C-441/17 R *Commission v. Poland*, EU:C:2017:622.

⁷⁵ See e.g. Poland's environment minister, Jan Szyszko: 'we will not be insulted by those who don't know about the rules of protection of environment', quoted in J. Berendt, 'Defying E.U. Court, Poland Is Cutting Trees in an Ancient Forest', *New York Times*, 31 July 2017: <<https://www.nytimes.com/2017/07/31/world/europe/poland-bialowieza-forest-bison-logging.html>>

⁷⁶ R. Grzeszczak and I.P. Karolewski, 'Białowieża Forest, the Spruce Bark Beetle and the EU Law Controversy in Poland', *VerfBlog*, 27 November 2017: <<http://verfassungsblog.de/bialowieza-forest-the-spruce-bark-beetle-and-the-eu-law-controversy-in-poland/>>

⁷⁷ P. Wennerås, 'Saving a forest and the rule of law', op. cit.

⁷⁸ Case C-441/17 R *Commission v. Poland*, para. 102.

Applying this reasoning to the present case, the Court ruled that Poland would have to pay a periodic penalty payment of at least €100,000 per day should it be found to have violated the interim measures ordered in this case, having previously noted that ‘there is sufficient material in the file to give the Court grounds for doubting’⁷⁹ that Poland had complied with the first order or was prepared to comply with the Court’s second order.

The duty to ensure the effective application of EU law

What is particularly striking in this order, if not entirely justified, is the repeated emphasis on the Court’s duty to ensure the effective application of EU law, which includes the full effectiveness of its decisions (‘effectiveness’ being used eleven times in the order). And indeed, as rightly recalled by the Court, the very ‘purpose of the procedure for interim relief is to guarantee the full effectiveness of the future final decision, in order to avoid a lacuna in the legal protection afforded by the Court’.⁸⁰ This fundamental aspect – although fully rooted in EU primary law – has been criticised by Pål Wennerås. Indeed, rather than doing the ‘leg work’, the Court focused on the aims of Article 279 TFEU (virtually unaltered since its first incarnation as Article 186 EEC in the original 1957 Treaty of Rome).⁸¹ However, ‘by emphasizing the objectives and effectiveness of Article 279 TFEU rather than its wording, and treating counterarguments sparsely’, the order ‘*unnecessarily* gives the impression of creating the law rather than declaring it’.⁸² Be that it as it may, we find the Court’s conclusion in relation to the scope of Article 279 TFEU compelling.

The case itself concluded with a Grand Chamber judgment issued on 18 April 2018. The Court ruled that Poland had failed to fulfil its obligations under EU law.⁸³ This outcome was the exact opposite of what had been predicted by the then environment minister of Poland – a professor of forestry – who anticipated a total ‘victory’ in Luxembourg as Poland allegedly was 100% compliant with EU law.⁸⁴ However, the Polish government’s ‘scientific’ arguments appear to have been non-existent since, as Pål Wennerås reported, the Polish authorities allowed the cutting down of *any* trees in the name of saving the forest from a spruce beetle. Indeed, while ‘the chainsaws had also torn through pine, hornbeam, oak, alder, ash, willow and poplar trees [...] the spruce bark beetle, as its name suggests, is

⁷⁹ Ibid., para. 109.

⁸⁰ Ibid., para. 94.

⁸¹ Suddenly reinventing the meaning of this provision now, more than sixty years after its entry into force, does not help meet the condition of legal certainty, one might argue: P. Wennerås, ‘Saving a forest and the rule of law’ *op. cit.*, at 547.

⁸² Ibid., 541 (emphasis added).

⁸³ Case C-441/17 *Commission v. Poland*, EU:C:2018:255.

⁸⁴ B. Bodalska, ‘Environment minister: Poland has to win at the European Court of Justice’, *Euractiv*, 5 December 2017: <<http://www.euractiv.com/section/energy-environment/news/environment-minister-poland-has-to-win-at-the-european-court-of-justice/>>

fond of spruces (coniferous trees) and not broad leaf trees.⁸⁵ Moreover, the forest management plan itself recognised that ‘removing spruce colonised by the beetle [...] actually threatened the favourable conservation of habitats’.⁸⁶

Playing dumb

Notwithstanding credible reports of continuing non-compliance on the ground, the Commission never undertook any subsequent thorough investigation to the best of our knowledge.⁸⁷ The Commission also failed to apply for the imposition of financial penalties for the obvious period of non-compliance with the Court’s order of 27 July 2017, which lasted until at least the Court’s second order of 20 November 2017. There was similarly no attempt to sanction Poland for the five months it took formally to comply with the order to suspend logging activities in relevant areas.⁸⁸ The Commission’s failure even to attempt to financially sanction Polish authorities for their defiant, legally established and long-lasting violation of a Court order may leave one perplexed. It brings to the fore the absence of any legal avenue when the Guardian of the Treaties is unwilling to return to the Court of Justice to sanction obvious violations of the Court’s previous orders, thus seriously and significantly undermining the effectiveness of the EU legal system – this notwithstanding the fact that the goal of enforcement is to bring about compliance, not punishment, as the Court underlined itself⁸⁹ and as is clear from the literature.⁹⁰ Neither is it supposed to compensate for the damage caused.⁹¹ The Commission’s reluctance to sanction the deliberate disregard of the Court’s orders and/or judgments was unsurprisingly understood as a sign of weakness by the current Polish authorities which increasingly stopped hiding their non-compliance. It was not however until 18 February 2021 – almost three years later – that the Commission finally but belatedly adopted a letter of formal notice in which it asked the Polish authorities to take all required measures to implement the Court of Justice’s judgment of 17 April 2018.⁹² Polish authorities

⁸⁵ P. Wennerås, ‘Saving a forest and the rule of law’, op. cit., at 544.

⁸⁶ Ibid.

⁸⁷ A. Barteczko, ‘Poland spares forest to win EU favour, but damage already done’, *Reuters*, 19 February 2018: <<https://reut.rs/2CvFoa0>>

⁸⁸ ‘Minister środowiska chce uchylenia decyzji ws. usuwania drzew’, *TVN24*, 15 May 2018: <<https://tvn24.pl/biznes/z-kraju/minister-srodowiska-chce-uchylenia-decyzji-ws-usuwania-drzew-ra837224-4500886>>. For further analysis, see T.T. Koncewicz, ‘The Politics of Resentment and First Principles in the European Court of Justice’, in F. Bignami (ed.), *The European Law in Populist Times* (Cambridge: CUP, 2020), 457.

⁸⁹ See, e.g., para. 102.

⁹⁰ K. Lenaerts, ‘Our Judicial Independence and the Quest for National, Supranational and Transnational Justice’, in G. Sevik, M.-J. Clifton, T. Haas, L. Lourenço and K. Schwiesow (eds), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Berlin: Springer, 2019), 155, at 156; L.W. Gormley, ‘Infringement Proceedings’, in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 65.

⁹¹ Case C-304/02 *Commission v. France*, EU:C:2005:444, para. 91.

⁹² European Commission, ‘Nature protection: Commission is calling on POLAND to implement the Court of Justice ruling on nature protection in the Białowieża Forest’, February infringements package: key decisions, 18 February 2021, INF/21/441.

replied to the letter of formal notice on 19 April 2021 with the Commission yet to decide at the time of writing whether a reasoned opinion is necessary.⁹³

Leaving aside the issue of persistent non-compliance and the Commission's rather nonchalant attitude in this respect, the most crucial outcome of the *Białowieża Forest* case seems to go way beyond the rethinking of Article 279 TFEU potential and saving a UNESCO heritage site from national authorities having gone rogue. In agreement with Wennerås' analysis, possibly the most important lesson one can draw from the Court's interim order of 20 November 2017 is the imperative requirement for *national courts* (which, of course, assume there are still independent courts left in the relevant country) to be fully prepared to similarly adopt interim freezing measures when EU law would so require, a particularly important point in the context of the ongoing rule of law breakdown in a country such as Poland:

Insofar as *Polish Forest* finds that [the necessity to guarantee availability of robust interim relief] is also dictated by the rule of law in Article 2 TEU, *Associação Sindical dos Juizes Portugueses* suggests that the same applies to *domestic courts* as fellow guardians of the rule of law by virtue of Articles 19(1) and 4(3) TEU. Consequently, if indeed effective judicial review requires that non-compliance with interim measures can be sanctioned, it follows that the Member States must make such a sanction available in order to fulfil their obligation to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law.⁹⁴

Almost a year later, yet another unprecedented order was adopted by the Court, this time not to defend its own authority, but to preserve the independence of Poland's Supreme Court. In doing so, the Court continued building what Professor Koncewicz described as the Court's 'existential jurisprudence'.⁹⁵

3.1.2 Moving beyond warnings: Case C-619/18 R *Commission v. Poland (Independence of the Supreme Court)*

On 2 July 2018 the Commission launched an infringement procedure against Poland in respect of the new Polish law on the Supreme Court which, *inter alia*, retroactively lowered the retirement age of Supreme Court judges, including the then First President of the Supreme Court, notwithstanding the fact that her six-year mandate was explicitly guaranteed in the Constitution.⁹⁶ For the Polish

⁹³ Commission's Answer to Parliamentary question E-001681/2021, 27 May 2021.

⁹⁴ P. Wennerås, 'Saving a forest and the rule of law', *op. cit.*, at 556 (footnotes omitted, emphasis added).

⁹⁵ T.T. Koncewicz, 'The *Białowieża* case. A Tragedy in Six Acts', *VerfBlog*, 17 May 2018: <<https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts/>>.

⁹⁶ Case C-619/18 R *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2018:1021. See I. Pingel, 'L'affaire *Indépendance de la Cour suprême* devant la Cour de justice: réflexions sur "l'indispensable liberté des juges"' (2019) 4(3) *European Papers* 823.

government, the express constitutional guarantee did not matter as ‘just like every Pole’, the First President ‘is bound by the law’,⁹⁷ which apparently does not however include the Polish Constitution.

This was a tactic previously used in Hungary,⁹⁸ which had resulted in a Pyrrhic victory for the Commission. Indeed, even though the Court of Justice established a violation of the principle of non-discrimination on the basis of age, the government of what has since become ‘the EU’s first ever authoritarian member state’,⁹⁹ was allowed, *de facto*, to profit from its deliberate blatant violation of the principle of the irremovability of judges. In other words, the Court’s ruling did not prevent in any way the capture of the senior echelons of the Hungarian judiciary.¹⁰⁰ This exemplifies what one of the present authors, writing together with Kim Scheppele and Barbara Grabowska-Moroz, has described as the Commission’s record of ‘losing by winning’.¹⁰¹ If it is any consolation for the EU in this context, the European Court of Human Rights has not performed any better when it comes to sanctioning this targeted purge of Hungary’s senior judicial leadership.¹⁰²

The European Commission did however finally learn from its erroneous framing of the issue and rightly decided, following the Court’s not so subliminal message in *Portuguese Judges*, to challenge the Polish government’s planned purge of Poland’s Supreme Court on the basis of Article 19(1) TEU read in connection with Article 47 CFR. In this context, the Commission, in the absence of any satisfactory answers from Polish authorities, not only referred Poland to the Court of Justice but also requested it to order interim measures until it issues a judgment on the merits. In an unprecedented, crucial and welcome development, the Commission also requested the Court to order measures which would *restore* Poland’s Supreme Court to its situation *before* 3 April 2018 when the contested

⁹⁷ C. Davies, ‘Poland’s supreme court constitutional crisis approaches a standoff’, *The Guardian*, 2 July 2018: <<https://www.theguardian.com/world/2018/jul/02/polands-supreme-court-constitutional-crisis-comes-to-a-head>>.

⁹⁸ Case C-286/12 *Commission v. Hungary (Judicial Retirement Age)*, EU:C:2012:687.

⁹⁹ S.F. Maerz et al., ‘State of the world 2019: autocratisation surges – resistance grows’ (2020) 27(6) *Democratization* 909.

¹⁰⁰ U. Belavusau, ‘On Age Discrimination and Beating Dead Dogs: *Commission v. Hungary*’ (2013) 50 *Common Market Law Review* 1145; T. Gyulavári and N. Hős, ‘Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts’ (2013) 42 *Indiana Law Journal* 289; A. Vincze, ‘The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 *Commission v. Hungary*’ (2013) 19 *European Public Law* 489; K.L. Scheppele, ‘Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)’ (2014) 23 *Transnational Law & Contemporary Problems* 51; G. Halmái, ‘The Early Retirement Age of Hungarian Judges’, in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge: CUP, 2017), 471.

¹⁰¹ K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, after All’ (2020) 39 *Yearbook of European Law* 3.

¹⁰² See e.g. D. Kosař and K. Šipulová, ‘The Strasbourg Court Meets Abusive Constitutionalism: *Baka v. Hungary* and the Rule of Law’ (2018) 10 *Hague Journal of the Rule of Law* 83.

measures were adopted. The Court obliged and ordered Polish authorities to immediately suspend the application of the relevant measures as requested by the Commission.

ORDER OF THE COURT (Grand Chamber)

17 December 2018

In Case C-619/18 R,

**APPLICATION for interim measures under Article 279 TFEU
and Article 160(2) of the Rules of Procedure of the Court of Justice
*European Commission v. Poland (Independence of the Supreme Court)***

[For ease of reading, references to previous cases have been omitted]

Excerpts:

2 The Commission has also requested [...] that the interim measures referred to in paragraph 1 above be granted before the defendant has submitted its observations, owing to the immediate risk of serious and irreparable damage to the right to effective judicial protection in the context of the application of EU law.

3 Those requests have been made in the context of an action for failure to fulfil obligations under Article 258 TFEU brought by the Commission on 2 October 2018 ('the action for failure to fulfil obligations') seeking a finding that by, first, lowering the retirement age for judges of the Sąd Najwyższy (Supreme Court) and applying that measure to serving judges who were appointed to that court before 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the period of active judicial service of judges of that court beyond the newly-set retirement age, the Republic of Poland has failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). That action was registered as Case C-619/18.

[...]

44 It cannot be excluded, *prima facie*, that the provisions of national legislation at issue are at odds with the Republic of Poland's obligation under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter to ensure effective judicial protection in the fields covered by EU law.

[...]

68 Consequently, the fact that, because of the application of the provisions of national legislation at issue, the independence of the Sąd Najwyższy (Supreme Court) may not be guaranteed pending delivery of the final judgment is likely to cause serious damage to the EU legal order and thus to the rights which individuals derive from EU law and to the values, set out in Article 2 TEU, on which the European Union is founded, in particular the rule of law.

69 Furthermore, it should be borne in mind that national supreme courts play a crucial role, within the judicial systems of the Member States of which they form part, in the implementation, at national level, of EU law, so that any threat to the independence of a national supreme court is likely to affect the entirety of the judicial system of the Member State concerned.

70 In addition, the serious damage referred to in paragraph 68 above is also likely to be irreparable.

71 First, as a court adjudicating at last instance, the Sąd Najwyższy (Supreme Court) makes decisions, including in cases giving rise to the application of EU law, which have the authority of *res judicata* and are thus likely to have an irreversible effect on the EU legal order.

[...]

73 Second, because of the authority of decisions of the Sąd Najwyższy (Supreme Court) with regard to lower national courts or tribunals, the fact that, in the event that the provisions of national legislation at issue are applied, the independence of that court may not be guaranteed pending delivery of the final judgment is likely to undermine the trust of the Member States and their courts in the Republic of Poland's judicial system and, as a result, in that Member State's observance of the rule of law.

74 In such circumstances, the principles of mutual trust and mutual recognition between Member States, which are justified by the premise that the Member States share a series of common values on which the European Union is founded, such as the rule of law, could be jeopardised.

75 As is noted by the Commission, the undermining of those principles may have serious and irreparable effects on the proper functioning of the EU legal order, in particular in the area of judicial cooperation in civil and criminal matters, which is based on a particularly high degree of trust between the Member States in the compliance of their judicial systems with the requirements of effective judicial protection.

[...]

78 It must therefore be held that the Commission has established that, in the event of a refusal to grant the interim measures sought, the application of the provisions of national legislation at issue pending delivery of the final judgment is likely to cause serious and irreparable damage to the EU legal order.

[...]

95 The Republic of Poland's arguments are, however, based on a misunderstanding of the nature and effects of the interim measures sought by the Commission in the present interlocutory proceedings. Indeed, granting such interim measures entails an obligation for that Member State immediately to suspend the application of the provisions of national legislation at issue, including those whose effect is to repeal or replace the previous provisions governing the retirement age for judges of the Sąd Najwyższy (Supreme Court), so that those previous provisions become applicable again pending delivery of the final judgment. Thus, the implementation of an interim measure suspending the application of a provision entails an obligation to ensure that the rule of law preceding the entry into force of that provision – in the present case, the legal regime laid down by the provisions of national legislation repealed or replaced by the provisions of national legislation at issue – is restored.

[...]

115 Thus, it is apparent from the examination carried out in accordance with the case-law cited [...] above that there would be a risk that the general interest of the European Union in the proper functioning of its legal order would be seriously and irreparably affected, pending the final judgment, if the interim measures sought by the Commission were not ordered but the action for failure to fulfil obligations were to be upheld.

116 By contrast, the Republic of Poland's interest in the proper functioning of the Sąd Najwyższy (Supreme Court) is not likely to be thus affected in the event that the interim measures sought by the Commission are granted but the action for failure to fulfil obligations is dismissed, given that that grant would merely have the effect of maintaining, for a limited period, the application of the legal system which existed prior to the adoption of the Law on the Supreme Court.

117 In those circumstances, it must be concluded that weighing up the interests involved supports granting the interim measures requested by the Commission.

118 Having regard to all of the foregoing, it is appropriate to grant the Commission's request for interim measures [...]

Analysis

About six months following the *first* ever activation of Article 7(1) TEU on the ground that there is a clear risk of a serious breach by Poland of the rule of law,¹⁰³ the Commission finally decided to launch, for the *first* time, an infringement action in respect of one of the key problematic issues highlighted in its own reasoned proposal under Article 7(1): the new retirement regime of the Supreme Court judges, including the First President of the Supreme Court, and the connected regime governing the prolongation of the judicial mandates forcibly retired on the basis of a retroactive application of a lower retirement age. In its Article 7(1) reasoned proposal, the Commission had previously summarised its concerns as follows:

- The compulsory retirement of a significant number of the current Supreme Court judges combined with the possibility of prolonging their active judicial mandate, as well as the new disciplinary regime for Supreme Court judges, structurally undermine the independence of the Supreme Court judges, whilst the independence of the judiciary is a key component of the rule of law;
- The compulsory retirement of a significant number of the current Supreme Court judges also allows for a far reaching and immediate recomposition of the Supreme Court. That possibility raises concerns in relation to the separation of powers, in particular when considered in combination with the simultaneous reforms of the National Council for the Judiciary. In fact all new Supreme Court judges will be appointed by the President of the Republic on the recommendation of the newly composed National Council for the Judiciary, which will be largely dominated by the political appointees. As a result, the current parliamentary majority will be able to determine, at least indirectly, the future composition of the Supreme Court to a much larger extent than this would be possible in a system where existing rules on the duration of judicial mandates operate normally – whatever that duration is and with whichever state organ the power to decide on judicial appointments lies.¹⁰⁴

Faced with a flagrant and irreversible violation of the rule of law in its judicial independence dimension, and in the absence of any changes addressing its concerns, the Commission finally decided on 2 July 2018 to bring to the Court of Justice's attention an infringement action based directly on Article

¹⁰³ D. Kochenov, L. Pech and K.L. Scheppelle, 'The European Commission's Activation of Article 7: Better Late than Never?', *VerfBlog* 23 December 2017: <<https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/>>

¹⁰⁴ Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, 2017/0360 (APP), 20 December 2017, recital 175.

19(1) TEU read in connection with Article 47 CFR. A few months prior to this, the Commission had inaugurated the use of this analytical framework in Case C-192/18 *Commission v. Poland (Independence of Ordinary Courts)* which concerned the lowering of the retirement age for judges of the ordinary Polish courts. In this latter case, lodged with the Court on 15 March 2018 but only decided by the Court on 5 November 2019, *after* Case C-619/18 had been decided on the merits on 24 June 2019, the Commission did not however – and we would argue wrongly – request interim measures.

Be that as it may, we will focus here on the Court’s interim relief order in Case C-619/18 R, which is also noteworthy for being the *first* where the Commission raised the problematic and potentially unlawful composition of a national council for the judiciary. In the case of Poland, the Commission was of the view that the new body – re-established in 2018 following the premature termination of the members of Polish National Council for the Judiciary (the ‘NCJ’) – was no longer ‘in line with European standards on judicial independence’.¹⁰⁵

First application for interim measures based on Article 19(1) TEU read in connection with Article 47 CFR

Having been prepared on an expedited basis, and in the absence of any answers from Polish authorities alleviating its legal concerns, the Commission announced its decision to refer Poland to the Court of Justice on 24 September 2018. When it did so, the European Commission took another unprecedented but, in our view, indispensable step: it asked the Court to order interim measures, *for the first time*, on the basis of Article 19(1) TEU read in connection with Article 47 CFR so as to prevent serious and irreparable damage to judicial independence in Poland, which the Commission noticeably and rightly equated with a risk of serious and irreparable damage of the EU legal order. Even more importantly and strikingly, the Commission also asked the Court to restore ‘Poland’s Supreme Court to its situation before 3 April 2018, when the contested new laws were adopted’,¹⁰⁶ new laws which the First President of the Supreme Court accurately described as organising a ‘purge’ of the Supreme Court.¹⁰⁷

¹⁰⁵ European Commission, Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court, Press release IP/18/4341, 2 July 2018. For further analysis on Poland’s neo-NCJ, see our analysis of Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. e.a. (Independence of the disciplinary chamber of the Supreme Court)* in Section 4.1.

¹⁰⁶ European Commission, Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court, Press release IP/18/5830, 24 September 2018.

¹⁰⁷ ‘Poland Supreme Court judges return to work after EU court ruling’, *Euractiv*, 23 October 2018: <<https://www.euractiv.com/section/future-eu/news/poland-supreme-court-judges-return-to-work-after-eu-court-ruling/>>

Prior to the final order of 17 December 2018, and as requested by the Commission, the Vice-President of the Court adopted an order on 19 October 2018 before Poland submitted its observations in the interim proceedings, which *provisionally* granted all of the Commission's requests.¹⁰⁸ Both interim orders can be viewed as ground-breaking not least because they forced the Polish authorities, despite initial threats of non-compliance similar to those we observed in Case C-441/17 R *Białowieża Forest*,¹⁰⁹ grudgingly to accept what the Commission had requested from the Court: the restoration of the legal situation which had existed *prior* to the entry into force of the provisions in dispute. At last, the Commission appeared to have finally learnt from the unfortunate example of its hollow legal victory against Hungary¹¹⁰ which, although identical on the facts, did not lead to any improvement of the rule of law situation on the ground, as a return to the *status quo ante* never happened and was indeed not even requested by the Commission.¹¹¹

Innovative aspects of the Court's reasoning

The Court's reasoning in its order of 17 December 2018 is particularly rich and instructive. The reasoning's most striking element is arguably the unprecedented emphasis on the imperative need to protect the general interest of the EU in the proper functioning of its legal order and the link made between the preservation of the independence of Poland's Supreme Court and the preservation of the proper functioning of the EU legal order. The Commission did indeed, and one may add appropriately, raise the issue of the serious and irreparable damage to the proper functioning of the EU legal order that the application of the disputed national legal provisions would create. The Grand Chamber of the Court accepted the argument and held that the application of these legal provisions would be 'likely to cause serious damage to the EU legal order and thus to the rights which individuals derive from EU law and to the values, set out in Article 2 TEU, on which the European Union is founded, in particular the rule of law'.¹¹²

¹⁰⁸ Order of the Vice-President of the Court in Case C-619/18 R *Commission v. Poland*, EU:C:2018:852.

¹⁰⁹ J. Shotter et al., 'Poland warns European Court of Justice to stay out of judicial reforms', *Financial Times*, 27 August 2018: 'Poland's deputy prime minister warned that any adverse ruling of the Court would have to be ignored "as contrary to the Lisbon Treaty and the whole spirit of European integration".'

¹¹⁰ D. Kochenov and P. Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 *European Yearbook of Constitutional Law* 243.

¹¹¹ See e.g. K.L. Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)' (2014) 23 *Transnational Law & Contemporary Problems* 51.

¹¹² Case C-619/18 R *Commission v. Poland*, para. 68.

This was, to the best of our knowledge, the *first* direct connection made by the Court between the notion of potential damage to the EU legal order and Article 2 TEU, endowing the latter with a practical justiciable deployment, the possibility of which some scholars had previously doubted.¹¹³ Another particularly remarkable and yet again, in our view, entirely justified element of the Court's reasoning are the two successive explicit links made, on the one hand, between 'any threat to the independence of a national supreme court' and the likelihood of this threat having a negative and serious impact on 'the entirety of the judicial system of the Member State concerned';¹¹⁴ and, on the other hand, between the undermining of the independence of a national supreme court and the likelihood of a negative 'irreversible effect on the EU legal order',¹¹⁵ in particular by undermining the principles of mutual trust and mutual recognition.

Commentators noted that it is not only the clarity and depth of the legal argument used by the Court, but the sheer swiftness of the injunction and its political significance, that make this order stand out: the Commission and the Court of Justice finally found in this case the right language in which to speak to the autocrats in the backsliding Member State, as noted by Professor Adamski:

By the very act of bringing an action against Poland for infringing EU law the Commission effectively deprived the Polish Government of an opportunity to peddle its (illiberal) concepts of the rule of law and democracy. The ECJ does not offer the parties before it a forum to engage in heated political debates, or to deliver emotional speeches riveting the attention of the broader society. Compared to the alternative, inherently political, procedures, the very specifics of court proceedings force litigants to use complex arguments expressed in legalese. Nor does the complicated and sophisticated language used by the Court when justifying its decisions offer illiberals a rewarding fodder reducible to a simple message tailored to their electoral base. [...] This could be seen as a sign of excessive recklessness even among PiS voters, especially when, after the initial swaggering reactions, the government soon gave in and expeditiously adopted the requested domestic legal adjustments.¹¹⁶

¹¹³ M. Aybelj, 'Pluralism and Systemic Defiance in the European Union', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017); G. Itzcovich, 'On the Legal Enforcement of Values: The Importance of the Institutional Context', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017). To contrast with L. Pech, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law" (2010) 6 *European Constitutional Law Review* 359.

¹¹⁴ *Ibid.*, para. 69.

¹¹⁵ *Ibid.*, para. 71.

¹¹⁶ D. Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56 *Common Market Law Review* 623, at 653–654.

Indeed, having previously threatened to disregard any adverse order from the Court of Justice, the Polish authorities did comply, albeit reluctantly.¹¹⁷ The now credible threat, following the Court's order in *Białowieża Forest*, of being subjected to a daily and significant penalty payment for non-compliance may have played a role here, in part, since such fines are difficult to present to voters as a matter of political revenge.¹¹⁸ Reluctant compliance was however also facilitated here by the fact that the Commission did *not* seek to prevent Poland's ruling coalition from *unlawfully* appointing a sizeable number of 'fake judges' to capture the Supreme Court from within.¹¹⁹ Furthermore, history soon repeated itself with more threats of non-compliance from Polish authorities (followed by actual non-compliance) after the Commission submitted a belated application for interim measures in the context of its third rule of law-based infringement action against Polish authorities, this time in respect of its new disciplinary regime for judges, and which is examined next. The situation has since gone from bad to worse following the Court of Justice's latest order suspending the 'Disciplinary Chamber' in Case C-204/21 R, with current Polish authorities no longer recognising the authority of the Court to issue interim orders in relation to its judicial 'reforms' on account of the (alleged) unconstitutionality of these orders following a 'judgment' issued by Poland's (unlawfully composed) Constitutional Tribunal as will be explained below.

3.1.3 First significant blows: Case C-791/19 R *Commission v. Poland (Independence of the Disciplinary Chamber of the Supreme Court)*¹²⁰ and Case C-204/21 R *Commission v. Poland (Muzzle Law)*¹²¹

On 3 April 2019, the European Commission launched its third infringement action in respect of the new disciplinary regime for judges organised by Poland's ruling party, an issue which the Commission had previously repeatedly highlighted in its rule of law opinions, its Article 7(1) Reasoned Proposal and its contributions to the Council prior to each of the Article 7(1) hearings organised to date. Within the framework of this infringement action (C-791/19), decided on the merits on 15 July 2021, the Court, on 8 April 2020, issued yet another unprecedented interim relief order to deal with a similarly unprecedented attempt by an EU Member State to subject national judges to disciplinary investigations, procedures and ultimately sanctions, on account of the *content* of their judicial decisions, including any eventual decisions to refer questions to the Court of Justice for a preliminary ruling. The continuing deterioration

¹¹⁷ A. Rettman, 'Polish president attacks EU court on eve of divisive march', *EUObserver*, 9 November 2018: <<https://euobserver.com/justice/143339>>

¹¹⁸ D. Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries', *op. cit.*, at 654.

¹¹⁹ For further analysis of the Polish ruling coalition's 'court packing', see *infra* Section 6.

¹²⁰ EU:C:2020:277.

¹²¹ EU:C:2021:593.

of the situation in Poland led the Commission, as previously noted, to launch a fourth infringement action which was lodged with the Court of Justice on 1 April 2021 and included another request for interim measures under Article 279 TFEU. On 14 July 2021, in Case C-204/21 R, the Vice-President of the Court of Justice ordered the immediate suspension of the application of certain provisions of the law of December 2019 on the judiciary (Poland's 'muzzle law'), including on the functioning of the 'Disciplinary Chamber'. This was the second time this body was suspended by the Court in little over 16 months. At the time of writing, Polish authorities, including the (irregularly appointed) First President of Poland's Supreme Court, have publicly indicated their intention to disregard both the Court's order in Case C-204/21 R and the Court's judgment in C-791/19.¹²² In order to assuage the EU and help secure the approval of its recovery and resilience and receive billions of EU grants and loans, Poland's de facto leader has nonetheless announced the future dissolution of the 'Disciplinary Chamber' while publicly stating that he does 'not recognise' the ECJ order and judgment 'as they clearly go beyond the Treaties'.¹²³ However, this eventual dissolution is nothing less than a smokescreen as the disciplinary chamber would just be reconstituted within the criminal chamber and in any event, the mere future dissolution of the 'Disciplinary Chamber' does not in and of itself constitute *full* compliance with either the Court's order in Case C-204/21 R or the Court's judgment in C-791/19.¹²⁴ In the meantime, the 'Disciplinary Chamber' continues to openly operate in violation of the Polish Constitution, EU law but also ECHR law as will be explained *infra*.

¹²² See D. Tilles, 'Polish government "not planning" to implement EU court rulings', *Notes from Poland*, 16 July 2021 and 'Polish justice minister says Warsaw cannot comply with EU's court ruling', *Euractiv.com*, 22 July 2021. This led thousands of Polish judges to publicly call on the government and the 'First President' of the Supreme Court to comply with the Court of Justice's rulings: 'Historical appeal of 2073 Polish judges in defense of EU Law', *Rule of Law in Poland*, 27 July 2021.

¹²³ A. Ptak, 'Poland to dissolve judges' Disciplinary Chamber to meet EU demands', *Reuters*, 7 August 2021: <<https://www.reuters.com/world/europe/poland-will-change-disputed-disciplinary-chamber-ruling-party-head-says-2021-08-07/>>

¹²⁴ For further analysis, see W. Sadurski, 'The Disciplinary Chamber May Go – but the Rotten System will Stay', *VerfBlog*, 11 August 2021: <<https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/>> and Iustitia report on the activities of the Polish authorities following the rulings of the ECJ of 14 July 2021 in Case C-204/21 and of 15 July 2021 in Case C-791/19, 16 August 2021: <<https://www.iustitia.pl/postepowania-dyscyplinarne/4213-sprawozdanie-z-dzialan-polskich-wladz-po-orzeczeniach-trybunalu-sprawiedliwosci-ue-z-14-lipca-2021-roku-w-sprawie-c-204-21-i-z-15-lipca-2021-roku-w-sprawie-c-791-19>>

ORDER OF THE COURT (Grand Chamber)

8 April 2020

In Case C-791/19 R,

**APPLICATION for interim measures under Article 279 TFEU
and Article 160(2) of the Rules of Procedure of the Court of Justice
*European Commission v. Poland (new disciplinary regime for judges)***

[For ease of reading, references to previous cases have been omitted]

Excerpts

1 By its application for interim measures, the European Commission claims that the Court should:

- order the Republic of Poland, pending the judgment of the Court of Justice ruling on the substance of the case:
 - to suspend the application of the provisions of Article 3(5), Article 27 and Article 73(1) of the *ustawa o Sądzie Najwyższym* (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, item 5), as amended ('the Law on the Supreme Court'), forming the basis of the jurisdiction of the *Izba Dyscyplinarna* (Disciplinary Chamber) of the *Sąd Najwyższy* (Supreme Court, Poland) ('the Disciplinary Chamber') to rule, both at first instance and on appeal, in disciplinary cases concerning judges;
 - to refrain from referring the cases pending before the Disciplinary Chamber to a panel whose composition does not meet the requirements of independence defined, in particular, in the judgment 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; 'the judgment in *A.K.*'), and
 - to inform the Commission, at the latest one month after being notified of the order of the Court imposing the requested interim measures, of all the measures that it has adopted in order to comply fully with that order;
- order the Republic of Poland to pay the costs of the proceedings.

[...]

35 It is therefore for all Member States, pursuant to the second subparagraph of Article 19(1) TEU, to ensure that the disciplinary regime applicable to the judges of national courts within their judicial system in the fields covered by EU law complies with the principle of judicial independence, in particular by ensuring that decisions given in disciplinary proceedings brought against the judges of those courts are reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence.

[...]

41 Consequently, and contrary to the Republic of Poland's submissions, the Court has jurisdiction to adopt interim measures of the kind sought by the Commission.

[...]

78 Consequently, without ruling at this stage on the merits of the arguments put forward by the parties in the action for failure to fulfil obligations, which falls within the exclusive jurisdiction of the court adjudicating on the substance, it must be held that, in the light of the facts put forward by the Commission and the interpretative guidance provided, inter alia, by the judgment of 24 June 2019, *Commission v Poland* (Independence of the Supreme Court) (C-619/18, EU:C:2019:531), and by the judgment in *A.K.*, the arguments presented by the Commission in the second complaint of the first plea in the action for failure to fulfil obligations, which underlies this application for interim measures, appear, prima facie, not to be unfounded, within the meaning of the case-law cited in paragraph 52 of this order.

[...]

81 In the light of the foregoing considerations, it must be concluded that the requirement that a prima facie case be established has been satisfied in this case.

[...]

90 The mere prospect, for the judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts, of being exposed to the risk of a disciplinary procedure capable of leading to proceedings being brought before a body whose independence is not guaranteed is liable to affect their own independence. The number of proceedings actually brought, to date, with regard to such judges and the outcome of those proceedings is irrelevant in that regard.

[...]

93 It follows from the foregoing that the application of the national provisions at issue, in so far as they confer jurisdiction to rule on disciplinary matters relating to the judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts to a body, in the present case the Disciplinary Chamber, whose independence may not be guaranteed, is liable to cause serious and irreparable harm to the EU legal order.

[...]

103 In the light of the above considerations, it must be held that the requirement that a *prima facie* case be established has been satisfied in the present case.

[...]

109 In that regard, it should, first of all, be noted that, as recalled in paragraph 29 of the present order, although the organisation of justice of the Member States falls within their competence, the fact remains that, in exercising that power, the Member States are required to comply with their obligations under EU law and, in particular, the second subparagraph of Article 19(1) TEU.

110 Next, as has been pointed out in paragraphs 44 and 47 of the present order, the grant of the interim measures sought would entail neither the dissolution of the Disciplinary Chamber nor, accordingly, the removal of its administrative and financial services, but the provisional suspension of its activity until delivery of the final judgment.

111 Furthermore, inasmuch as granting those measures would mean that the processing of cases pending before the Disciplinary Chamber must be suspended until delivery of the final judgment, the harm resulting for the individuals concerned from the suspension of those cases would be less than that resulting from the examination of those cases by a body, namely the Disciplinary Chamber, whose lack of independence and impartiality cannot, *prima facie*, be ruled out.

112 Finally, the budgetary difficulties invoked by the Republic of Poland which would be connected with the grant of the interim measures sought cannot take precedence over the risk of harm to the general interest of the European Union with regard to the proper functioning of its legal order.

113 In those circumstances, it must be concluded that the balance of interests leans in favour of granting the interim measures requested by the Commission.

114 In the light of all the foregoing, the Court grants the Commission's application for interim measures referred to in paragraph 1 of the present order.

Analysis

The Court of Justice's order in Case C-791/19 R is the *third* instance where the Court has granted interim measures applied for by the Commission to preserve the rule of law from being seriously and irreparably harmed by the Polish authorities.¹²⁵ As previously analysed, the first time the Court had to noticeably step in was in November 2017 when the Polish authorities publicly refused to obey a previous order of the Court to stop logging in the Białowieża forest.¹²⁶ The second time the Court was forced to make history happened the following year when the Polish authorities attempted to forcibly dismiss judges of Poland's Supreme Court on the basis of a lowered retirement age applied retroactively. The Court then ordered the immediate suspension of the application of relevant national rules which meant that Polish authorities had to *restore* the Supreme Court to its situation *prior* to the entry into force of the law being challenged by the Commission.¹²⁷

*The beginning of the end for Poland's 'star chamber'*¹²⁸

In the present and third instance, the Court of Justice ordered the immediate suspension of the activities of the 'Disciplinary Chamber' ('DC') as regards disciplinary cases concerning judges. The Court's order is connected to Case C-719/19 (which was decided on 15 July 2021¹²⁹), which is itself the third infringement action launched by the Commission on the basis of Article 19(1) TEU to protect Polish judges from their national authorities.¹³⁰ This is also the third infringement action which brought to the Court's attention issues the Commission had previously repeatedly raised as part of the Rule of Law Framework and subsequently as part of the Article 7(1) procedure. In this case, the main subject matter of the action is the DC, a body established in 2017 and whose lack of independence and impartiality has been repeatedly raised by

¹²⁵ The analysis in this section directly draws from L. Pech, 'Protecting Polish Judges from the Ruling Party's "Star Chamber": The Court of Justice's interim relief order in Commission v. Poland (Case C-791/19 R)', *VerfBlog*, 9 April 2020: <<https://verfassungsblog.de/protecting-polish-judges-from-the-ruling-partys-star-chamber/>>. For a more comprehensive analysis of the Court's order and subsequent non-compliance by Polish authorities, see L. Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber"' (2021) 58 *Common Market Law Review* 137.

¹²⁶ See *supra* 3.1.1.

¹²⁷ See *supra* 3.1.2.

¹²⁸ We are alluding here to the infamous English court that developed in the late 15th century. See E. Cheyney, "The Court of Star Chamber" (1913) 18(4) *The American Historical Review* 727, p. 727: 'the Court of Star Chamber won enough prominence and enough odium in the sixteenth and early seventeenth centuries to obtain formal abolition by act of Parliament in 1641. It has left its name to later times as a synonym for secrecy, severity, and the wresting of justice.'

¹²⁹ See *infra* 3.2.3.

¹³⁰ In his Opinion delivered on 6 May 2021 in Case C-791/19, EU:C:2021:366, AG Tanchev advised the Court to rule that the new Polish disciplinary regime for judges is contrary to EU law.

multiple organisations and experts specialising in rule of law matters.¹³¹ In this context, it is also worth noting that the European Commission, *for the very first time*, simultaneously and appropriately raised a violation of Article 267 TFEU to the extent that the new disciplinary regime would create ‘a chilling effect for making use of this mechanism’.¹³²

The Commission did not however initially apply for interim measures when it decided to refer Poland to the Court of Justice on 10 October 2019, although the Commission did request the Court to expedite the proceedings, which was however subsequently rejected by the Court on the grounds that its action raised sensitive and complex legal problems.¹³³ By contrast, in the case relating to the independence of Poland’s Supreme Court, the Commission requested both interim measures and expedited proceedings and was granted both, and this is what should have been done in the present dispute as well. In any event, following the Polish authorities’ repeated public refusal to comply with the ruling of the Labour and Social Security Chamber of Poland’s Supreme Court, which found the DC *not* to constitute a court within the meaning of EU and Polish law by application of the preliminary ruling of the Court of Justice in *A.K.*,¹³⁴ the Commission belatedly decided to apply for interim measures on 14 January 2020. As correctly noted by the Commission itself, ‘*despite* [our emphasis] the judgments, the Disciplinary Chamber continues to operate, creating a risk of irreparable damage for Polish judges and increasing the chilling effect on the Polish judiciary’.¹³⁵

¹³¹ See e.g. Venice Commission, *Poland Opinion on the draft Act amending the Act on the National Council of the Judiciary, on the draft Act amending the Act on the Supreme Court and on the Act on the Organisation of Ordinary Courts* (11 December 2017) CDL-AD(2017)031, para. 89 and paras 91–92: ‘The proposed reform, if implemented, will not only threaten the independence of the judges of the SC, but also create a serious risk for the legal certainty and enable the President of the Republic to determine the composition of the chamber dealing with the politically particularly sensitive electoral cases. While the Memorandum speaks of the “de-communization” of the Polish judicial system, some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites [...] there is a risk that the whole judicial system will be dominated by these new judges, elected with the decisive influence of the ruling majority’. On the issue of whether these ‘new judges’ may be correctly described as judges or should rather be viewed as usurpers (within the meaning of English law), considering the fundamental irregularities which have characterised their appointment, see *infra* Section 6.

¹³² European Commission, Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control, Press release IP/19/1957, 3 April 2019. On the increasing use and untapped potential of the concept of chilling effect to better protect inter alia judicial independence, see L. Pech, *The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU*, March 2021: <<https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect>>

¹³³ Case C-791/19 R, op. cit., para. 102.

¹³⁴ The Court’s judgment in *A.K.* is analysed *infra* in Section 4.1.

¹³⁵ European Commission, Court of Justice for interim measures regarding the Disciplinary Chamber of the Supreme Court in Poland, MEX/20/56, *Daily news*, 14 January 2020.

Commission's misguided litigation strategy

The Court's order deals with this aspect, which was unsurprisingly raised by the Polish government at the stage of the examination of the urgency of the Commission's request for interim measures. Instructively, the Court makes clear the Commission's rationale. In a nutshell, the Commission decided not to apply for interim measures because it expected the *A.K.* preliminary ruling to deal with the issue of the DC.¹³⁶ While the Court found the Commission's rationale to be 'reasonable', we find it neither coherent nor judicious. As the Court of Justice itself explained in a not so subliminal message to the Commission in *Miasto Łowicz and Prokurator Generalny*:¹³⁷ 'the task of the Court must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations'. In other words, the Commission is implicitly but unambiguously told not to abstain from launching infringement actions on the basis of similar issues being raised in the context of national requests for a preliminary ruling. Indeed, as recalled by the Court itself, its preliminary ruling jurisdiction is much more limited than its jurisdiction in infringement cases, where the Court can directly find that a Member State has violated the principle of judicial independence.

In this context, we might find it difficult to understand why the Commission did not follow the same path that it had in the case relating to the independence of the Supreme Court, and request that the Court *provisionally* grant interim measures *before* submission by Poland of its observations and until such time as an order is made closing the interim proceedings. Considering the repeated threats of non-compliance with the Court of Justice's rulings and the current Polish authorities' track record of non-compliance with rulings of the Polish courts,¹³⁸ the Commission's failure to ask the Court to impose a penalty payment in case of non-compliance could also leave us perplexed. In this instance, the Commission only deemed it necessary to reserve the right to submit an additional request seeking that payment of a fine be ordered in case of non-compliance with the interim measures ordered, following its initial request for interim relief. However, the choice not to make this request from the start proved misguided. Indeed, *within twenty-four hours following the Court's order*,

¹³⁶ Case C-791/19 R, op. cit., paras 97–98.

¹³⁷ The Court's judgment in *Miasto Łowicz* is analysed *infra* in Section 4.2.

¹³⁸ For further evidence, see e.g. T.T. Konciewicz, 'Of Institutions, Democracy, Constitutional Self-Defence, and the Rule of Law' (2016) 53 *Common Market Law Review* 1753; T.T. Konciewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 *Review of Central and East European Law* 116; W. Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP, 2019). For a broader take on how constitutional courts can be transformed into anti-rule of law bodies, see P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts' (2019) 15 *European Constitutional Law Review* 48.

both the government and the DC had indicated publicly they would refuse to comply with it.¹³⁹

The order's most significant aspects

Leaving the issue of non-compliance aside, and to keep this analysis as brief as possible, only the most significant aspects of the Court's order will be highlighted below.

To begin with, following the line of case law developed since its seminal *Portuguese Judges* ruling, the Court reiterates that every Member State of the EU is legally obliged to respect and maintain the independence of their national courts or tribunals (which may apply or interpret EU law). This general obligation *includes* a specific obligation to comply with the principle of independence of judges as far as disciplinary proceedings against judges are concerned.¹⁴⁰ This means *inter alia* that EU law *precludes* the setting up of disciplinary bodies which themselves fail to satisfy the guarantees inherent in effective judicial protection, including that of independence. While not surprising, this was a new and welcome clarification.

Secondly, by including unusual developments outlining how its own *A.K.* ruling and connected rulings issued by the Polish Supreme Court were disregarded by the Polish authorities and in particular the (unconstitutional) DC at the beginning of its order,¹⁴¹ the Court implicitly but unmistakably indicated its disapproval at the DC's persistent and unprecedented refusal to obey both EU *and* Polish law. This was bound to have legal weight when the Court came to decide whether the Commission had correctly established that the granting of the requested interim measures satisfied the condition in relation to the existence of *fumus boni juris*. Unsurprisingly, having first meticulously recalled what it had previously decided in *A.K.* as regards the scope of the requirements of independence and impartiality, the Court held that the Commission's claim regarding the lack of a guarantee as to the independence and impartiality of the DC appeared, *prima facie*, not unfounded.

¹³⁹ S. Bodoni and M. Strzelecki, 'Poland Ordered to 'Immediately' Halt Judge-Discipline System', *Bloomberg*, 8 April 2020: <<https://www.bloomberg.com/news/articles/2020-04-08/poland-told-to-immediately-halt-judicial-disciplinary-system>> ('The government hit back, questioning the EU court's ability to rule on matters in Poland. Warsaw will refer the decision to Poland's Constitutional Tribunal before responding to the bloc, Premier Mateusz Morawiecki said Wednesday'). The DC similarly refused to immediately and fully comply with the ECJ's interim order and referred it to the captured 'Constitutional Tribunal' notwithstanding the obvious lack of jurisdiction of this body, not to mention its illegal composition: See DC press release, I DO 16/19, 10 April 2020.

¹⁴⁰ Case C-791/19 R, *op. cit.*, para. 35.

¹⁴¹ *Ibid.*, paras 18–24.

Thirdly, as regards urgency, in an unprecedented step (to the best of our knowledge), the Court found that a body such as the DC could pose a threat of serious and irreparable harm to the EU legal order due to the scope of its disciplinary jurisdiction as regards Polish judges and the fact that its lack of independence and impartiality could not be, *prima facie*, ruled out. The Court's holistic approach, which considered the broader and systemic impact that the DC's seeming lack of independence could have on ordinary courts and the Supreme Court as a whole, is both warranted and compelling. Particularly significant is the Court's observation that the 'mere prospect' for Polish judges to be referred to a body whose independence would not be guaranteed, is likely to affect their independence *regardless* of how many proceedings may have been initiated or the outcomes of these proceedings to date.¹⁴²

Fourthly, the Court has suspended, again for the first time to the best of our knowledge, the activity of a body whose members as well as the national authorities responsible for establishing this body in the first place, claim is a court. In this context, the Polish government argued that the Commission was asking the Court to take measures which would violate the 'fundamental structural principles of the Polish state',¹⁴³ having previously and ludicrously claimed a violation of the principle of irremovability of judges,¹⁴⁴ which the Polish authorities were held to have violated twice by the Court in the two previous unprecedented infringement rulings examined *infra*.¹⁴⁵ In its answer to this claim, the Court of Justice patiently explained that its order does not in fact require the dissolution of the DC, nor the suspension of its administrative and financial services or the dismissal of the individuals appointed to this body which, as noted by the Court of Justice itself, was *already* found not to constitute a court by Poland's Supreme Court prior to the Court of Justice's order. Since then, the Polish authorities had not only actively and purposely organised the systemic violation of the ruling of the Court of Justice of 19 November 2019 and connected rulings of the Supreme Court (the not yet captured parts of it), they had also refused to acknowledge, let alone comply with, the resolution adopted by three (then still independent) chambers of Poland's Supreme Court on 23 January 2020, which reiterated that the DC is not a court and which cannot therefore issue any rulings.¹⁴⁶

In light of the above, and unsurprisingly, the Court granted the Commission's application for interim measures.

¹⁴² *Ibid.*, para. 90.

¹⁴³ *Ibid.*, para. 106.

¹⁴⁴ *Ibid.*, para. 43.

¹⁴⁵ See Section 3.

¹⁴⁶ Supreme Court of Poland, Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20, 23 January 2020, para. 55. This Resolution is briefly presented *infra* in Section 6.

Ignoring violations of the Court's order

A particularly dispiriting aspect of this belated application for interim measures is the Commission's failure to promptly and decisively react to the repeated violations of the Court's order of 8 April 2020 within the framework of the previously lodged Case C-791/19. Indeed, and to put it concisely, notwithstanding this Court's order of April 2020, the DC had continued to impose *disciplinary* sanctions when lifting the judicial immunity of judges who happened – pure coincidence no doubt – to be the most vocal defenders of judicial independence. The DC did so after being found to be a body established in violation of the Polish Constitution by the independent chambers of Poland's Supreme Court. To add insult to injury, these requests to lift judicial immunity originates from a special unit established in 2016 within the national prosecutor's office tasked with investigating judges and prosecutors which experts have long argued is itself a body which flagrantly violates EU law as it does not demonstrate any degree of operation and investigative independence and has been used as an instrument of pressure and intimidation against Polish judges and prosecutors.¹⁴⁷ And yet the Commission has persistently refused to launch an infringement action either in respect of this special unit or a similar body established in Romania to go after independent judges and prosecutors. In the first judgment it issued in relation to the situation regarding judicial independence in Romania, the Court of Justice could not have made it clearer that the Commission was wrong not to have done so. Indeed, the second subparagraph of Article 19(1) TEU also covers the creation and functioning of any specialised section of a national public prosecutor's office with exclusive competence to investigate offences committed by judges and prosecutors. In order to be compatible with EU law, any prosecutorial unit of this nature must inter alia exercise its competence in compliance with the requirements of the EU Charter and in particular, Articles 47 and 48 of the Charter, while being regulated by legislation which ensures that this type of unit cannot be used as an instrument of political control over the activities of judges and prosecutors.¹⁴⁸

To return to the issue of Poland's DC, when finally shamed into action following inter alia the unusual public statement by a sitting ECJ judge, making it unambiguously clear that the ECJ's order was being violated,¹⁴⁹ the Commission

¹⁴⁷ L. Pech, P. Wachowicz and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1, pp. 24–25.

¹⁴⁸ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația Forumul Judecătorilor din România et al.*, EU:C:2021:393, paras 213–223.

¹⁴⁹ See ECJ Judge Safjan quoted in A. Wójcik, 'Sedzia TSUE: Izba Dyscyplinarna nie ma prawa orzekać takich sankcji jak wobec Tulei i Morawiec', *OKO.press*, 25 November 2020: <<https://oko.press/izba-dyscyplinarna-nie-ma-prawa-orzekac/>>. See also the judgment of Amsterdam Court of 10 February 2021, NL:RBAMS:2021:420, para. 5.3.5: 'the Court finds that a disciplinary chamber was set up in Poland and is actually operating, although this is contrary to the interim measure of the Court of Justice, based on which the operation of this disciplinary chamber should have been suspended'.

opted for the least effective way forward possible by adopting an additional letter of formal notice on 3 December 2020 in connection to its infringement procedure against Poland's 'muzzle law'.¹⁵⁰ While we fully agree with the Commission's assessment that Polish authorities continue to violate EU law by allowing the DC 'to decide on further matters which directly affect judges',¹⁵¹ including cases for the lifting of judicial immunity, the Commission should have instead immediately returned to the Court of Justice and requested that it fine the Polish authorities for their repeated and open violations of the order of 8 April 2020. The Commission's failure to do so has meant many months of unnecessary additional mental distress and irreparable damage for those subject to the unlawful harassment and sanctions organised by Poland's ruling coalition and their satellite bodies such as the (unconstitutional) DC. Be that as it may, the Commission did ultimately return to the Court and at least requested a comprehensive set of interim measures which were all granted by the Vice-President of the Court of Justice on 14 July 2021.

*The second suspension of Poland's 'Star Chamber' in Case C-204/21 R*¹⁵²

In its request for interim measures, the Commission asked the Court to inter alia suspend the provisions empowering the Disciplinary Chamber of the Supreme Court to decide on requests for the lifting of judicial immunity; suspend the effects of decisions *already* taken by the Disciplinary Chamber on the lifting of judicial immunity, and suspend the provisions preventing Polish judges from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the Court of Justice as well as the provisions qualifying action taken by judges in that respect as disciplinary offences.

On 14 July 2021, the day before the Court's judgment in C-791/19, the Vice-President of the Court granted these measures and ordered what amounts to the second suspension of the Disciplinary Chamber, this time to prevent it from waiving the judicial immunity of Polish judges. Conceptually, the most significant aspect of the Court's order of 14 July 2021 is the first explicit clarification that decisions regarding the lifting of judicial immunity are directly connected to the status and conditions of exercise of judicial functions. As such, this type of decisions cannot fall within the jurisdiction of a body which itself lacks independence.

¹⁵⁰ European Commission, *Rule of Law: Commission follows up on infringement procedure to protect judicial independence of Polish judges*, INF/20/2142, 3 December 2020.

¹⁵¹ *Ibid.*

¹⁵² The text below borrows from L. Pech, 'Protecting Polish Judges from Political Control: A brief analysis of the ECJ's infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law)', *VerfBlog*, 20 July 2021: <<https://verfassungsblog.de/protecting-polish-judges-from-political-control>>

Practically, the most significant aspect of the Court's order is the suspension of the DC for any case regarding any judge as well as the first ever suspension (albeit to a limited extent) of the second new chamber created by current Polish authorities known as the Chamber of Extraordinary Control and Public Affairs (CECPA) and which, similarly to the DC, consists entirely of defectively appointed 'judges'.¹⁵³ This aspect has largely gone unnoticed. To oversimplify, in open violation of the Court of Justice's *Simpson* and *HG* judgment¹⁵⁴ and the stricter interpretation of the right to a tribunal established by law contained therein, the muzzle law gave the CECPA the exclusive competence assessing whether courts, chambers or panels involving Poland's ruling coalition's appointed 'judges' are still tribunals established by law. This was done, in manifest violation of EU law, to prevent (independent) Polish judges from undertaking this type of check. This means, however, and to put it bluntly, that CECPA's (fake) 'judges' were put in charge of assessing whether other (fake) 'judges' are not in fact (fake) 'judges'... Remarkably, in this context, the Polish government has (accidentally) admitted that a Polish judge applying the EU legality and independence checks required under Article 19(1) TEU/Article 47 CFR could face disciplinary proceedings for doing so!¹⁵⁵ In any event, the Court of Justice has now suspended the activities of the CECPA in this respect due to the serious doubts surrounding its independence from political interference.

Another key but not unprecedented aspect of the Court's order¹⁵⁶ is that it suspends the effects of decisions *already* taken by the DC on the lifting of judicial immunity. This means for instance that well-known Judge Igor Tuleya¹⁵⁷ ought to be able immediately return to work. He was however once again (unlawfully) barred from doing so on account that his suspension ordered by the twice-suspended DC is still binding notwithstanding that the Court of Appeal of Warsaw on 26 February 2021 already ruled otherwise.¹⁵⁸

Violating the Court's order (bis repetita)

In addition to the concrete example just mentioned, the Court's general jurisdiction to issue orders relating to Poland's judicial 'reforms' has been found

¹⁵³ This is discussed in detail in Section 6 *infra*.

¹⁵⁴ EU:C:2020:232. For further analysis, see Section 5.6 *infra*.

¹⁵⁵ EU:C:2021:593, para. 185.

¹⁵⁶ See previously the order adopted by the Court in Case C-619/18 R which demanded the restoration of Poland's Supreme Court's situation which existed *before* the adoption of the new law on the Supreme Court of 3 April 2018 challenged by the Commission.

¹⁵⁷ D. Tilles, 'Judge critical of Polish government barred from returning to work as dispute over judiciary deepens', *Notes from Poland*, 1 March 2021: <<https://notesfrompoland.com/2021/03/01/judge-critical-of-polish-government-barrd-from-returning-to-work-as-dispute-over-judiciary-deepens/>>

¹⁵⁸ M. Jałoszewski, 'Jest zawiadomienie do prokuratury na Nawackiego, Radzika i Schaba za niewykonanie orzeczeń TSUE', *OKO.press*, 26 July 2021: <<https://oko.press/jest-zawiadomienie-do-prokuratury-na-nawackiego-radzika-i-schaba-za-niewykonanie-orzeczen-tsue/>>

unconstitutional by the unlawfully composed Constitutional Tribunal of Poland on the same day the order in Case C-204/21 R was issued, prompting warning about a creeping Poxit from the EU's legal order. This resulted, at last, in a prompt reaction from the Commission:

The Commission is deeply concerned by the decision of the Polish Constitutional Tribunal, which states that the interim measures ordered by the Court of Justice of the European Union in the area of the functioning of the judiciary, are inconsistent with the Polish Constitution. This decision reaffirms our concerns about the state of the rule of law in Poland.

[...]

The European Commission expects Poland to ensure that all decisions of the European Court of Justice are fully and correctly implemented. This includes also yesterday's Court order to impose the interim measures on Poland to immediately suspend the application of certain provisions of the law of December 2019 on the judiciary, including on the functioning of the Disciplinary Chamber of the Supreme Court.

The Commission will not hesitate to make use of its powers under the Treaties to safeguard the uniform application and integrity of Union law.¹⁵⁹

At the time of finalising this study, and in the face of yet more open violations of the Court's orders¹⁶⁰ but also judgments by current Polish authorities and their (captured) 'courts' such as the unlawfully composed Constitutional Tribunal, the European Commission did, for once, promptly and decisively react: On 7 September 2021, the European Commission did finally react to the open violation of both the Court's order of 14 July 2021, analysed above, and the Court's infringement judgment of 15 July 2021 in Case C-791/19, to be

¹⁵⁹ Statement by the European Commission on the decision of the Polish Constitutional Tribunal of 14 July, 21/3726, 15 July 2021: <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_3726>

¹⁶⁰ With this pattern of systemic non-compliance not limited to rule of law issues but also now re-affecting EU environmental law: See European Commission, 2021 Rule of Law Report. Country Chapter on the rule of law situation in Poland, 20 July 2021, SWD(2021) 722 final, p. 4: 'the Polish Government has openly defied the binding nature of an interim measures order issued by the Court of Justice on 21 May 2021 in a case lodged against Poland for breach of EU environmental law' (this case is known as C-121/21 R Czech Republic v. Poland). The Czech Republic has since asked the Court of Justice to impose a daily penalty payment of €5 million per day until Poland complies with the Court's order. On 20 September 2021 (EU:C:2021:752), the Vice-President of the Court ordered Polish authorities to pay the European Commission a daily penalty payment of €500,000 per day on account of their failure to comply with the measures ordered previously by the Vice-President of the Court on 21 May 2021 (EU:C:2021:420) starting from the date of notification of the order of 20 September 2021 to Poland and until that Member State complies with the interim order.

analysed below.¹⁶¹ With respect to the order, the Commission has requested the ECJ to impose a daily penalty payment as long as the interim measures ordered by the Court are not fully complied with. With respect to the judgment, the Commission has launched a separate procedure under Article 260(2) TFEU and sent a letter of formal notice to the Polish authorities. This judgment, which is the third judgment issued by the Court of Justice on the basis of an infringement action lodged by the Commission, will be analysed below, alongside the other infringement actions decided to date by the Court.

3.2 The Commission's infringement actions in respect of Poland's so-called 'judicial reforms'

To date, the European Commission has launched a total of four infringement actions on the basis of the second subparagraph of Article 19(1) TEU to protect judicial independence in Poland as well as prevent irreparable damage to the EU legal order. While each of these actions was entirely warranted, this gives us an average of *less than one* infringement action per year since Poland's rule of law breakdown began in late 2015. The most recent action (C-204/21) took in practice more than *fifteen months* to reach the Court of Justice, hardly projecting the sense of urgency one would expect to see from the Guardian of the Treaties when faced, according to the Commission's own analysis, with a piece of legislation (informally known as the 'muzzle law') which deliberately organises a *de facto* Polesxit from the fundamental principles underlying the EU legal order by inter alia prohibiting judges from applying EU requirements relating to judicial independence failing what disciplinary proceedings and sanctions may ensue.¹⁶²

This arguably parsimonious as well as painstakingly slow use of the infringement procedure by the Commission offers a striking contrast to the unprecedented rapidity of Poland's descent into authoritarianism, with Poland having been identified as the world's most autocratising country for the period 2010–2020 by democracy experts. The world's second most autocratising country in the world for the same period is Orbán's Hungary, which is itself no longer considered a democracy and can therefore be considered as being structurally in breach of the most basic condition of EU membership.

¹⁶¹ Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber, IP/21/4587, 7 September 2021: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4587>

¹⁶² See L. Pech, K.L. Scheppele, W. Sadurski, 'Before It's Too Late', *VerfBlog*, 28 September 2020: <<https://verfassungsblog.de/before-its-too-late/>>; M. Taborowski, 'On the PM Morawiecki motion to the Constitutional Tribunal regarding EU Treaties conformity with the Polish Constitution', *Rule of Law in Poland*, 27 April 2021: <<https://ruleoflaw.pl/on-the-pm-morawiecki-motion-to-the-constitutional-tribunal-regarding-eu-treaties-conformity-with-the-polish-constitution-case-k-3-21/>>; T.T. Konciewicz, 'How the EU is becoming a rule-of-law-less union of States. From Polesxit to E(U)exit?', *VerfBlog*, 28 April 2021, <<https://verfassungsblog.de/how-the-eu-is-becoming-a-rule-of-law-less-union-of-states/>>. As previously mentioned, Poland's (unlawfully composed) Constitutional Tribunal has also decided that interim measures ordered by the Court of Justice in the area of the functioning of the judiciary cannot be obeyed as they would be allegedly unconstitutional. Another pending motion before the captured Constitutional Tribunal is asking this body to confirm that the same can be said of the Court of Justice's judgments.

Table 2 Top-10 Autocratizing Countries in the world according to V-DEM, 2010–2020¹⁶³

		<i>CHANGE</i>	<i>LDI</i> <i>2010</i>	<i>LDI</i> <i>2020</i>	<i>REGIME TYPE</i> <i>2010</i>	<i>REGIME TYPE</i> <i>2020</i>
1	Poland	-0.34	0.83	0.49	Liberal Democracy	Electoral Democracy
2	Hungary	-0.32	0.68	0.37	Electoral Democracy	Electoral Autocracy
3	Turkey	-0.29	0.40	0.11	Electoral Democracy	Electoral Autocracy
4	Brazil	-0.28	0.79	0.51	Electoral Democracy	Electoral Democracy
5	Serbia	-0.27	0.51	0.24	Electoral Democracy	Electoral Autocracy
6	Benin	-0.26	0.55	0.29	Electoral Democracy	Electoral Autocracy
7	India	-0.23	0.57	0.34	Electoral Democracy	Electoral Autocracy
8	Mauritius	-0.23	0.73	0.50	Liberal Democracy	Electoral Democracy
9	Bolivia	-0.18	0.41	0.231	Electoral Democracy	Electoral Autocracy
10	Thailand	-0.17	0.34	0.17	Electoral Autocracy	Closed Autocracy

Source: V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021, March 2021*, p. 38.

From an EU law perspective, we should stress the total absence of any infringement action on judicial independence grounds launched by the Commission as regards Hungary even when faced with a *blatant* violation of Article 19(1) TEU and Article 267 TFEU by the Hungarian authorities, including Orbán’s captured Supreme Court, following disciplinary proceedings targeting a national judge who referred judicial independence-related questions to the Court of Justice.¹⁶⁴

¹⁶³ See V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 38. Regarding the rule of law specifically, see also World Justice Project, *Rule of Law Index 2020 Insights*, 2020, p. 20, which identifies Poland, Hungary and Bulgaria as belonging to the group of countries which have experienced the biggest declines in constraints on government powers in the world since 2015. With a decline of -6.8% over the past five years in relation to this benchmark, which aims to identify countries engaged in a process of autocratization, Poland has experienced the worst decline in the world, which is only surpassed by Egypt.

¹⁶⁴ P. Bárd, ‘Jeopardizing Judicial Dialogue is Contrary to EU Law: The AG Opinion in the IS case’, *VerfBlog*, 20 April 2021: <<https://verfassungsblog.de/jeopardizing-judicial-dialogue-is-contrary-to-eu-law>>

As regards Poland, the attacks on judicial independence have been so flagrant and sustained that it has been impossible for the Commission to look the other way. By making unambiguously clear in the *Portuguese Judges* case that national authorities are under a strict EU law obligation to ensure that national courts meet the requirements essential to effective judicial protection, which includes an obligation to maintain these courts' independence, the Court of Justice pushed the Commission finally to proceed with infringement actions *directly* alleging a violation of the EU principle of judicial independence on the basis of the second subparagraph of Article 19(1) TEU. The Commission did so twice in 2018. It was a belated but welcome change in the Commission's infringement approach and its traditionally restrictive understanding of what can be achieved within the framework of the infringement procedure to defend judicial independence. In doing so, the Commission went beyond, and rightly so one may add, what had been anticipated by scholars in framing its infringement proceedings,¹⁶⁵ although we are still waiting for the Commission to go further and launch *systemic* infringement actions in order to address *systemic* attacks against the rule of law.¹⁶⁶

The same cannot be said of the Masters of the Treaties, which continue to hide behind the Commission's role as Guardian of the Treaties to justify their continuing refusal to launch their own infringement actions under Article 259 TFEU.¹⁶⁷ This is extremely regrettable, if not irresponsible, as the Commission has persistently failed to bring infringement actions in relation to a number of systemic rule of law problems and violations committed inter alia by captured and unlawfully composed bodies such as Poland's 'National Council

¹⁶⁵ See in particular M. Schmidt and P. Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) 55 *Common Market Law Review* 1061; P. Bárd and A. Śledzińska-Simon, 'Rule of Law Infringement Procedures: A Proposal to Extend the RU's Rule of Law Toolbox' (2019) *CEPS Paper No. 9*; L.W. Gormley, 'Infringement Proceedings', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 65; M. Smith, 'The Evolution of Infringement and Sanction Procedures. Of Pilots, Diversions, Collisions, and Circling', in A. Arnall and D. Chalmers (eds), *The Oxford Handbook of European Law* (Oxford: OUP, 2015), 350.

¹⁶⁶ K.L. Scheppelle, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016); D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed' (2013) *Polish Yearbook of International Law* 163.

¹⁶⁷ D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *The Hague Journal of the Rule of Law* 170.

for the Judiciary’ and ‘Constitutional Tribunal’, notwithstanding the repeated invitations to do so originating from the European Parliament.¹⁶⁸

3.2.1 First ever violation of the second subparagraph of Article 19(1) TEU: Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*¹⁶⁹

In the *Independence of the Supreme Court* case, the Court, for the very first time, reviewed the compatibility of a set of national measures specifically targeting the sitting judges of a national supreme court with the principle of judicial independence in the context of an infringement action. This judgment may also be viewed as the most important ruling to date regarding the applicability and the scope of the second subparagraph of Article 19(1) TEU and its relationship with Article 47 CFR, first clarified in the *Portuguese Judges* ruling, which was issued in the context of a national request for a preliminary ruling. This is also the Court’s first judgment which unambiguously rejected the validity of the claim, repeated ad nauseam by Polish and Hungarian authorities, that the Court of Justice would allegedly lack the jurisdiction to review national ‘reforms’ of the national justice systems.

¹⁶⁸ See the European Parliament resolution regarding the rule of law situation in Poland in which the Parliament urged the Commission to launch further infringement actions in relation to the unlawfully composed ‘Constitutional Tribunal’; the unlawfully composed ‘National Council for the Judiciary’ and the unlawfully composed new ‘extraordinary control’ chamber within Poland’s Supreme Court: European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, P9_TA(2020)-225. In a judgment of 7 May 2021, the European Court of Human Right confirmed the unlawful composition of the current ‘Constitutional Tribunal’: *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718: The bench which heard the case regarding the applicant included an individual unlawfully elected to the Constitutional Tribunal and cannot therefore be considered a tribunal established by law. For further analysis, see most recently B. Grabowska-Moroz, ‘Strasbourg Court Entered the Rule of Law Battlefield’, *Strasbourg Observers*, 13 September 2021.

¹⁶⁹ EU:C:2019:531. For further analysis, see P. Bárd and A. Sledzińska-Simon, ‘On the principle of irremovability of judges beyond age discrimination: *Commission v. Poland*’ (2020) 57 *Common Market Law Review* 1555; P. Bogdanowicz and M. Taborowski, ‘How to save a Supreme Court in a rule of law crisis: The Polish Experience’ (2020) 16 *European Constitutional Law Review* 306; P. Filipek, ‘Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości - uwagi w świetle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej’ (2019) 12 *Europejski Przegląd Sądowy* 4.

JUDGMENT OF THE COURT (Grand Chamber)

24 June 2019

Case C-619/18

ACTION under Article 258 TFEU for failure to fulfil obligations
European Commission v. Poland (Independence of the Supreme Court)

[For ease of reading, references to previous cases have been omitted]

Excerpt:

42 As is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union, the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premise that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values.

43 That premise both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected.

[...]

52 Furthermore, although, as the Republic of Poland and Hungary point out, the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU. Moreover, by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore, contrary to what is alleged by the Republic of Poland, arrogating that competence.

[...]

56 In the present case, it is common ground that the Sąd Najwyższy (Supreme Court) may be called upon to rule on questions concerning the application or interpretation of EU law and that, as a ‘court or tribunal’, within the meaning of EU law, it comes within the Polish judicial system in the ‘fields covered by Union law’ within the meaning of the second subparagraph

of Article 19(1) TEU, so that that court must meet the requirements of effective judicial protection.

57 To ensure that a body such as the Sąd Najwyższy (Supreme Court) is in a position to offer such protection, maintaining its independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an ‘independent’ tribunal as one of the requirements linked to the fundamental right to an effective remedy.

58 That 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, 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.

59 Having regard to the foregoing, the national rules called into question by the Commission in its action may be reviewed in the light of the second subparagraph of Article 19(1) TEU and it is therefore necessary to examine whether the infringements of that provision alleged by that institution are established.

[...]

78 In the present case, it must be held that the reform being challenged, which provides that the measure lowering the retirement age of judges of the Sąd Najwyższy (Supreme Court) is to apply to judges already serving on that court, results in those judges prematurely ceasing to carry out their judicial office and is therefore such as to raise reasonable concerns as regards compliance with the principle of the irremovability of judges.

79 In those circumstances, and having regard to the cardinal importance of that principle [...] such an application is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it.

80 In the present case the Republic of Poland claims that the decision to lower to 65 the retirement age of the judges of the Sąd Najwyższy (Supreme Court) was taken with the goal of standardising that age with the general retirement age applicable to all workers in Poland and, in doing so, of improving the age balance among senior members of that court.

[...]

82 However, it must be observed, first, that, as the Commission points out and as has already been observed by the European Commission for Democracy through Law ('Venice Commission') [...] the explanatory memorandum to the draft New Law on the Supreme Court contains information that is such as to raise serious doubts as to whether the reform of the retirement age of serving judges of the Sąd Najwyższy (Supreme Court) was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court.

[...]

96 Having regard to all the foregoing considerations, it must be held that the application of the measure lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court) to the judges in post within that court is not justified by a legitimate objective. Accordingly, that application undermines the principle of the irremovability of judges, which is essential to their independence.

[...]

110 Furthermore, although it is for the Member States alone to decide whether or not they will authorise such an extension to the period of judicial activity beyond normal retirement age, the fact remains that, where those Member States choose such a mechanism, they are required to ensure that the conditions and the procedure to which such an extension is subject are not such as to undermine the principle of judicial independence.

[...]

112 To that end, it is necessary, in particular, that those conditions and procedural rules are designed in such a way that those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardise their independence. Such procedural rules must thus, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.

113 In the present case, the conditions and the detailed procedural rules provided for under the New Law on the Supreme Court with regard to a potential extension beyond normal retirement age of the period for which a judge of the Sąd Najwyższy (Supreme Court) carries out his or her duties do not satisfy those requirements.

[...]

123 It follows that the Commission's second complaint, alleging breach of the second subparagraph of Article 19(1) TEU, and, accordingly, the action in its entirety, must be upheld.

Analysis

With this infringement ruling, Poland made history (again)¹⁷⁰ by becoming the first EU Member State held by the Court of Justice to have failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. According to the Court, Polish authorities did not merely violate the principle of judicial independence, they also violated the principle of the irremovability of judges following their attempted 'reform' of the Polish Supreme Court, which the then First President of the Supreme Court more accurately described as an attempted 'purge'.¹⁷¹

Recalling the basics

Before highlighting the most significant aspects of the Court's ruling, we should briefly recall what it unsurprisingly confirmed. To begin with, the Court reiterated that while the content of Article 19(1) TEU is informed by Article 47 CFR when it comes for instance to interpreting the principle of effective legal protection, Article 19(1) TEU can be applied independently from Article 47 CFR to review the compatibility of national law with EU law. Article 19(1) TEU has also a wider scope of application as it is not limited by Article 51 CFR. As observed by AG Tanchev, by virtue of the *Portuguese Judges* ruling, 'Article 19(1) TEU constitutes an autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence, which complements Article 47 of the Charter (and other provisions of the Charter as the case may be)'.¹⁷² In other words, national measures which may not be implementing EU law within the meaning of Article 51 CFR may still fall foul of the requirements of effective judicial protection, including judicial independence, as guaranteed by the second subparagraph of Article 19(1) TEU.

¹⁷⁰ We could for instance mention (without being exhaustive) that Poland became the first EU Member State subject to the Commission's Rule of Law Framework in January 2016; the first EU Member State subject to Article 7(1) TEU in December 2017; and, following the ECJ order issued on 20 November 2017, also the first EU Member State found liable to a periodic penalty payment of at least €100,000 per day were it to continue to disobey a previous interim order (see *supra* Section 3.1.1 for an analysis of the Court's order in the *Białowieża Forest* case).

¹⁷¹ 'Poland Supreme Court judges return to work after EU court ruling', *Euractiv*, 23 October 2018: <<https://www.euractiv.com/section/future-eu/news/poland-supreme-court-judges-return-to-work-after-eu-court-ruling/>>

¹⁷² Opinion delivered on 11 April 2019, EU:C:2019:35, para. 58.

With extensive references made to its previous *Portuguese Judges* ruling (which the Court referred to no less than thirteen times), the Court furthermore reiterated the duty of each Member State to comply with its obligations deriving from EU law. This includes an obligation to ensure that all national courts or tribunals which may be called upon to rule on questions concerning the application or interpretation of EU law meet the requirements of effective judicial protection, which necessarily means that national authorities must also *maintain* the independence of these national courts or tribunals. While the Court did not explicitly tackle this aspect, its judgment implicitly confirmed that the Commission may initiate an infringement action under Article 258 TFEU regarding a subject-matter falling within the scope of EU law which is simultaneously discussed within the framework of an ongoing Article 7(1) TEU procedure.¹⁷³

Polish authorities' bad faith

It is in relation to the second and third aspects mentioned above that the Court offers damning developments and goes further than the Opinion of AG Tanchev, although he did also previously conclude that Poland had violated the principles of the irremovability and the independence of judges. Indeed, the Court comes close to publicly stating that the Polish government sought to deliberately mislead it. One may for instance refer to paragraph 82 of the ruling where the Court expresses its 'serious doubts as to whether the reform of the retirement age of serving judges' of the Supreme Court was made in pursuance of the objectives rather than 'with the aim of side-lining a certain group of judges of that court'. The blunt nature of the Court's judgment and the unambiguous rejection of the legitimacy of the objectives officially put forward by the Polish government make quite a contrast with the gentle, if not naïve, approach of the Court a few years earlier in *Commission v. Hungary*.¹⁷⁴ In this case, the Court held that the objectives put forward by the Hungarian government were legitimate but the means used to achieve them disproportionate. There was however little doubt then that the real and only objective pursued by Orbán's government was to clear out the senior ranks of the Hungarian judiciary, to replace the forcibly

¹⁷³ This aspect was dealt with by AG Tanchev in his Opinion delivered on 11 April 2019, para. 50: 'There are firm grounds for finding that Article 7 TEU and Article 258 TFEU are separate procedures and may be invoked at the same time'. For a rejection of the (unpersuasive) *lex specialis* argument and a call for more infringement actions on the issues already highlighted in the Commission's Article 7(1) TEU reasoned proposal prior to the Court's ruling in the present case, see L. Pech and P. Wachowicz, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)', *VerfBlog* 17 January 2019: <<https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/>>, and see also K.L. Scheppele, L. Pech and R.D. Kelemen, 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism', *VerfBlog*, 12 November 2018: <<https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>>.

¹⁷⁴ Case C-286/12 *Commission v. Hungary (Judicial Retirement Age)*, EU:C:2012:687.

‘retired’ judges with autocracy-compatible senior judges.¹⁷⁵ In framing the case as an age-discrimination problem, the Commission and the Court missed a decisive opportunity to protect judicial independence in Hungary. Positively, by approaching the attempted purge of Poland’s Supreme Court through the lens of Article 19(1) TEU, the Court avoided the pitfalls of its previous approach.¹⁷⁶

In the present case, by emphasising repeatedly its ‘serious doubts’ regarding the genuine nature of the ruling coalition’s ‘reform’, as well as its ‘doubts’ regarding the ‘true aims’ of the ‘reform’ being challenged, the Court could not have made clearer its ire at this deliberate attempt to mislead it. One cursory look at the Polish government’s so-called *White Paper on the Reform of the Polish Judiciary* of March 2018¹⁷⁷ is indeed all it takes to realise that the Polish authorities never aimed to standardise the retirement age of Supreme Court Judges ‘with the general retirement age applicable to all workers in Poland and, in doing so, of improving the age balance among senior members of that court’.¹⁷⁸ Instead, and according to the White Paper itself, the main aims justifying the (alleged) ‘reform of judicial retirement age’ are ‘historical experiences of communism, the failure to account for the past for many years, and pathological [sic] mechanisms of the functioning of courts that have been perpetuated for years’.¹⁷⁹

These were never serious evidence-based claims. As regards the often advertised ‘decommunisation’ objective, one may for instance stress that 80% of Poland’s Supreme Court judges were removed in 1990 and that ‘the average age of a Polish judge is approximately 42 years, which means on average, they were 12 years old when the Communist regime fell’.¹⁸⁰ We could also note the obvious contradiction between the alleged need to ‘decommunise’ and ‘rejuvenate’ the Polish judiciary, and the decision of Poland’s ruling party to appoint two individuals¹⁸¹ to the by then already captured ‘Constitutional Tribunal’ who were both aged 67 at the time, with one of the two appointees having been a ‘member of communist party for 22 years’ and a ‘former prosecutor, who had worked during the period of martial law and prosecuted members of the anti-communist opposition’.¹⁸²

¹⁷⁵ For further analysis and references, see K. Kovacs and K.L. Scheppele, ‘The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union’ (2018) 51(3) *Communist and Post-Communist Studies* 189.

¹⁷⁶ For further analysis, see D. Kochenov and P. Bárd, ‘The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU’, op. cit.

¹⁷⁷ See Kancelaria Prezesa Rady Ministrów, ‘The government presents a White Paper on the reforms of the Polish justice system’, 8 March 2018: <<http://www.premier.gov.pl/en/news/news/the-government-presents-a-white-paper-on-the-reforms-of-the-polish-justice-system.html>>.

¹⁷⁸ Case C-619/18, op. cit., para. 80.

¹⁷⁹ *Ibid.*, para. 99.

¹⁸⁰ A.R. Gustafsson and P. Omtzigt, *The functioning of democratic institutions in Poland* (explanatory memorandum) (13 December 2019) Council of Europe (PACE), paras 88 and 18.

¹⁸¹ Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, 2017/0360 (APP), 20 December 2017, recital 57.

¹⁸² Batory Foundation and European Stability Initiative, ‘Poland’s deepening crisis. When the rule of law dies in Europe’, 14 December 2019, 7.

Considering the lack of seriousness and candour of the Polish government, the Court had no choice but to find that Polish authorities had violated the second subparagraph of Article 19(1) TEU by providing that the measure consisting in lowering the retirement age of the judges of the Supreme Court should apply to judges in post who had been appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age.

A template to follow

The Court has since deplored – albeit implicitly – a similar lack of good faith from the Polish authorities in Case C-192/18 *Commission v. Poland (Independence of Ordinary Courts)*. Before reviewing the Court’s judgment in what was chronologically speaking the first infringement action brought by the Commission against Poland on the basis of Article 19(1) TEU, this analysis can be concluded by stressing the highly effective nature of the Commission’s infringement action in the present case. To put it differently, the way the Commission has brought this action ought to be viewed as the template to follow to preserve the rule of law from serious and irreparable damage when it is threatened in a Member State. As time is absolutely of the essence when acting to preserve the rule of law, the Commission must systematically give no more than a month to the relevant Member State to reply to its letter of formal notice and to its reasoned opinion. Furthermore, *as soon as* the pre-litigation procedure has ended, the Commission ought to systematically submit an application for interim measures as well as request the relevant interim measures be granted before the defendant has submitted its observations, so as to avoid serious and irreparable damage to the principle of effective judicial protection, and failing which would leave the defendant free to waste time and change the facts on the ground, which is also why the Commission must systematically request the Court to restore the situation *prior* to the adoption of the national provisions in dispute. Finally, the Commission ought systematically to request the Court of Justice to decide the case under the expedited procedure.

3.2.2 Second ever violation of the second subparagraph of Article 19(1) TEU: Judgment of the Court (Grand Chamber) in Case C-192/18, *Commission v. Poland (Independence of the ordinary courts)*¹⁸³

With this ruling, Poland became the first EU Member State to be found to have failed to fulfil its Treaty obligations under the second subparagraph of Article 19(1) TEU twice in a row. While this infringement action was launched by the

¹⁸³ EU:C:2019:924. For further analysis, see e.g. A. Rasi, ‘Effetti indiretti della Carta dei diritti fondamentali? In margine alla sentenza *Commissione c. Polonia (Indépendance de la Cour suprême)*’ (2019) 4(2) *European Papers* 615.

Commission on 29 July 2017 and lodged with the Court on 15 March 2018, and therefore prior to the launch of the infringement action targeting the new retirement regime devised for sitting judges of Poland's Supreme Court, Case C-192/18 was decided *after* Case C-619/18 on 5 November 2019.

In this judgment, the Court unsurprisingly held that the Polish rules adopted in 2017 relating to the retirement age of prosecutors and judges of the ordinary courts, coupled with the new rules governing a possible extension to the period of active service of those judges, are not compatible with the requirements relating to the independence of judges and in particular the principle of irremovability of judges.¹⁸⁴ The Commission's additional submission that Poland had also infringed Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 because the rules in dispute fixed different retirement ages directly on the basis of sex, was also upheld by the Court. The following excerpts and subsequent analysis will however only focus on aspects relating to judicial independence.

JUDGMENT OF THE COURT (Grand Chamber)

5 November 2019

In Case C-192/18,

ACTION for failure to fulfil obligations under Article 258 TFEU

European Commission v. Poland (Independence of the ordinary courts)

[For ease of reading, references to previous cases have been omitted]

Excerpts:

104 In the present case, it is not in dispute that the ordinary Polish courts may, in that capacity, be called upon to rule on questions relating to the application or interpretation of EU law and that, as 'courts or tribunals' within the meaning of EU law, they come within the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU, so that those courts must meet the requirements of effective judicial protection.

105 To ensure that such ordinary courts are in a position to offer such protection, maintaining their independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy.

¹⁸⁴ This infringement action did not, however, target the Polish Minister of Justice's arbitrary power to appoint and dismiss presidents of courts in total impunity, an obvious threat to judicial independence and one of the core issues highlighted in the Commission's Article 7(1) TEU proposal. For a critique of this incomprehensible omission, see M. Taborowski, 'The Commission takes a step back in the fight for the Rule of Law', *VerfBlog*, 3 January 2018: <<https://verfassungsblog.de/the-commission-takes-a-step-back-in-the-fight-for-the-rule-of-law/>>

106 That 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, 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.

107 In the light of the foregoing, the national rules which are the subject of the second complaint set out by the Commission in its action may be reviewed in the light of the second subparagraph of Article 19(1) TEU and it should accordingly be examined whether, as the Commission contends, the Republic of Poland has infringed that provision.

[...]

116 In the present case, as explained both at the hearing and in its written pleadings, by its second complaint the Commission does not seek to criticise the measure lowering the retirement age of judges of the ordinary Polish courts in itself. This complaint is essentially directed at the mechanism with which that measure was coupled, under which the Minister for Justice has the right to authorise judges of those courts to continue actively to carry out judicial duties beyond the retirement age, as lowered. In the Commission's submission, in the light of its characteristics that mechanism undermines the independence of the judges concerned in that it does not enable it to be guaranteed that they will carry out their duties wholly autonomously and be protected against external intervention or pressure. Furthermore, the combination of the measure and the mechanism undermines their irremovability.

[...]

120 To that end, it is necessary, in particular, that those conditions and procedural rules are designed in such a way that those judges are protected from potential temptations to give in to external intervention or pressure that is liable to jeopardise their independence. Such procedural rules must thus, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.

121 In the present case, the conditions and the detailed procedural rules which the contested national provisions impose in relation to the possibility that judges of the ordinary Polish courts continue to carry out their duties beyond the new retirement age do not satisfy those requirements.

[...]

124 Having regard to the foregoing, it must be found that the power held in the present instance by the Minister for Justice for the purpose of deciding whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties, from the age of 60 to 70 years in the case of women and the age of 65 to 70 years in the case of men, is such as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests that may be the subject of argument before them.

125 Furthermore, that power fails to comply with the principle of irremovability, which is inherent in judicial independence.

126 In that regard, it is to be noted that that power was conferred on the Minister for Justice in the more general context of a reform that resulted in the lowering of the normal retirement age of, amongst others, judges of the ordinary Polish courts.

127 First, having regard, in particular, to certain preparatory documents relating to the reform at issue, the combination of the two measures referred to in the previous paragraph is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post.

[...]

130 [...] the combination of the measure lowering the normal retirement age to 60 years for women and 65 years for men and of the discretion vested in the present instance in the Minister for Justice for the purpose of granting or refusing authorisation for judges of the ordinary Polish courts to continue to carry out their duties, from the age of 60 to 70 years in the case of women and 65 to 70 years in the case of men, fails to comply with the principle of irremovability.

Analysis

This is the second infringement action where the Commission litigated issues previously raised in the context of the Rule of Law Framework and subsequently, in the Commission's Article 7(1) reasoned proposal which summarised the main problems as regards the Polish ordinary courts, as follows:

- by decreasing the retirement age of judges while making prolongation of the judicial mandate conditional upon the discretionary decision of the Minister of Justice, the new rules undermine the principle of irremovability of judges which is a key element of the independence of judges;
- the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts without being bound by concrete criteria, with no obligation to state reasons, with no possibility for the judiciary to block these decisions and with no judicial review available may affect the personal independence of court presidents and of other judges.¹⁸⁵

Unlike the first infringement action decided by the Court of Justice on the sole basis of Article 19(1) TEU, in this instance, the Court also decided the action on the basis of Article 157 TFEU and Directive 2006/54, with the legislation at issue found in breach of both.¹⁸⁶ The judgment's examination of the Polish legislation in light of the principles of judicial independence and the irremovability of judges are fully in line with the Court's approach, first developed in its *Independence of the Supreme Court* ruling, which itself meticulously applied the approach first developed in the *Portuguese Judges* judgment. As such, the Court's judgment in what is informally known as the *Independence of ordinary courts* case was neither unexpected, nor can it be considered as ground-breaking as the previously mentioned judgments from the perspective of Article 19(1) TEU. The ruling does however contain important confirmations and clarifications, especially with respect to the principle of irremovability of judges.

Confirmations and clarifications

First, this is the second infringement action launched by the Commission on the basis of the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, and the second time the Court decided the case on the sole basis of the second subparagraph of Article 19(1) TEU.

¹⁸⁵ Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, 2017/0360 (APP), 20 December 2017, recital 175.

¹⁸⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ 2006 L 204.

Second, the Court confirmed that Member States are bound by the second subparagraph of Article 19(1) TEU, which means that this Treaty provision can be relied upon by the Commission to challenge national measures which impair the judicial independence of any national court which may rule on questions relating to the application or interpretation of EU law.

Third, the Court also confirmed that the guarantees of independence and impartiality established in EU law require ‘certain guarantees’ and ‘appropriate procedures’ so as to protect judges from removal from office or arbitrary dismissals in a situation where a judge is deemed unfit for the purposes of carrying out his/her duties on account of incapacity or a serious breach of professional obligations.¹⁸⁷ Exceptions to the principle of irremovability, whose ‘cardinal importance’ is reiterated, are only compatible with EU law if these exceptions are justified by a legitimate objective, are proportionate in light of the relevant objective and inasmuch as they are ‘not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them’.¹⁸⁸

Fourth, and more originally, the Court found that the conditions *and* the procedural rules adopted by Poland were deficient, with relevant criteria being found excessively ‘vague’ and ‘unverifiable’. The lack of any obligation to state reasons, the lack of any obligation for the Minister for Justice to decide within a specific timeframe and the possibility to challenge relevant decisions in court proceedings were also disapprovingly noted by the Court. Also noteworthy and welcome is the Court’s acceptance of the Commission’s reasoning, which rightly emphasised the need to look at the *combination* of relevant measures and not merely at each relevant measure separately when assessing a possible violation of the principle of irremovability.

Fifth, and this is arguably the most significant aspect of the Court’s judgment, Poland is found to have once again violated the principle of irremovability, which is inherent in judicial independence. In this context, for the second time after Case C-619/18, the Court came close to explicitly stating that the Polish government has deliberately sought to mislead it regarding the *true aims* of yet another of its alleged ‘reforms’ when it stated that ‘the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges’.¹⁸⁹

¹⁸⁷ Case C-192/18, *op. cit.*, paras 112–113.

¹⁸⁸ *Ibid.*, para. 115.

¹⁸⁹ *Ibid.*, para. 127.

Lastly, when comparing the Court's judgment to the Opinion of Advocate General,¹⁹⁰ it is interesting to note that the Court did not follow or at least did not see the need to follow AG Tanchev's analysis regarding the material scope of application of the second subparagraph of Article 19(1) TEU. To summarise AG Tanchev's position, one should be able to invoke a free-standing violation of EU law with respect to the irremovability and independence of judges on the basis of Article 19(1) TEU, independently of the Charter and in particular Article 47 CFR, *only* in situations where the legal challenge is directly aimed at a 'structural infirmity in a given Member State'.¹⁹¹ This notion is understood by the AG as referring to national measures which undermine the 'institutional or operational independence of judges',¹⁹² and amount to 'systemic or generalised deficiencies, which "compromise the essence" of the irremovability and independence of judges', which was the case here 'given that the laws challenged by the Commission impact across entire tiers of the judiciary'.¹⁹³ By contrast, 'individual or particularised incidences of breach of the irremovability and independence of judges are to be dealt with under Article 47 of the Charter, and only in contexts in which Member States are implementing EU law under Article 51(1) of the Charter. In principle, a structural infirmity that additionally entails implementation of EU law by a Member State will fall to be determined by both provisions'.¹⁹⁴

Scope of application of Article 19(1) TEU

Without entering into a debate about the persuasive nature of this interpretation of the respective scope of application of Article 19(1) TEU, second paragraph, and Article 47 CFR, the Court did not endorse the AG's interpretation, and its case law to date continues to apply a simpler and arguably better approach: the second paragraph of Article 19(1) TEU is to be used when the national measures in dispute do not entail implementation of EU law *stricto sensu*, but impact courts or judges as a group. In situations where the Court is faced with national measures entailing implementation of EU law, the disputed measures will be assessed on the sole basis of Article 47 CFR, with any additional assessment under the second paragraph of Article 19(1) TEU being considered unnecessary to the extent that it would lead to similar legal outcomes.

¹⁹⁰ Opinion of Advocate General Tanchev delivered on 20 June 2019 in Case C-192/18 *Commission v. Poland (Independence of Ordinary Courts)*, EU:C:2019:529.

¹⁹¹ Case C-192/18, op. cit., para. 115.

¹⁹² *Ibid.*, para. 103.

¹⁹³ *Ibid.*, para. 115.

¹⁹⁴ *Ibid.*, para. 116.

Between arrogance and non-compliance

To conclude in respect of the Court's ruling in the present case, the Polish Minister of Foreign Affairs issued a press release¹⁹⁵ in which it stated that the Court of Justice wrongly found that Poland had infringed judicial independence. In this context, we should note that the Polish government had previously requested a reopening of the oral part of the procedure on the grounds that the AG would have incorrectly understood the Court's case law, in particular the *Portuguese Judges* ruling.¹⁹⁶ The Court naturally rejected this request as it is well-established that 'a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he examines in his Opinion, cannot in itself constitute grounds justifying the reopening of the oral part of the procedure'.¹⁹⁷

This episode does however suggest that the Polish government appears convinced it understands EU law better than the Commission, the Court of Justice and its Advocates-General combined. And while the Polish government expressly stated that Poland accepts its duty to comply with the Court of Justice's rulings, as we saw in respect of the Court's order in Case C-791/19 R *Commission v. Poland (Independence of the Disciplinary Chamber of the Supreme Court)*, this undertaking now appears to have been implicitly withdrawn. Indeed, at the time of writing, the unlawfully composed 'Constitutional Tribunal' of Poland was expected to give carte blanche to Polish authorities to disregard both the Court of Justice's orders and judgments regarding judicial independence matters.¹⁹⁸

Finally, the present authors are not aware of any measures adopted by the Polish authorities to remedy the situation of the judges who were affected by the new and unlawful retirement regime and in particular, the situation of the judges who were refused an extension to the age of 70.¹⁹⁹ We are similarly unaware of any thorough investigation by the Commission as to whether the Court of Justice's ruling was in fact fully complied with by Polish authorities. The seeming lack of follow-up is not without precedent, with the Commission also failing

¹⁹⁵ Ministerstwo Spraw Zagranicznych Rzeczypospolitej Polskiej, Stanowisko Ministerstwa Spraw Zagranicznych RP w związku z wyrokiem TSUE w sprawie C-192/18 Komisja przeciwko Polsce, 5 November 2019: <https://twitter.com/MSZ_RP/status/1191645296188645376>

¹⁹⁶ Case C-192/18, op. cit., para. 35.

¹⁹⁷ *Ibid.*, para. 37.

¹⁹⁸ See M. Taborowski, 'On the PM Morawiecki motion to the Constitutional Tribunal regarding EU Treaties conformity with the Polish Constitution (case K 3/21)', *Rule of Law in Poland*, 27 April 2021: <<https://ruleoflaw.pl/on-the-pm-morawiecki-motion-to-the-constitutional-tribunal-regarding-eu-treaties-conformity-with-the-polish-constitution-case-k-3-21/>>

¹⁹⁹ The AG refers to a figure which 'may be as high as 112 judges', op. cit., para. 107. See also Helsinki Foundation for Human Rights, 'It starts with the personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018', April 2018, p. 2: 'Information provided by the Ministry indicates that from 12 August 2017 to 28 February 2018 a total of 219 judges filed requests to be allowed to continue serving. The Minister of Justice reviewed 130 requests and granted consent to 69 of them'.

to investigate, to the best of our knowledge, whether the Court of Justice's order in *Commission v. Poland (Białowieża forest)* was ever fully complied with notwithstanding evidence to the contrary.²⁰⁰

3.2.3 Third ever violation of the second subparagraph of Article 19(1) TEU: Judgment of the Court (Grand Chamber) in Case C-791/19, *Commission v. Poland (Disciplinary regime for judges)*²⁰¹

With this ruling, Poland became the first EU Member State to be found to have failed to fulfil its Treaty obligations under the second subparagraph of Article 19(1) TEU thrice in a row with the Court of Justice finding in this instance Poland's new disciplinary regime for Polish judges to be incompatible with EU law. The Court has also issued several judgments in answer to preliminary ruling requests from under siege Polish judges,²⁰² with more than 20 pending references yet to be dealt with. If this was not complicated enough, the European Court of Human Rights has recently stepped into the fray with close to 40 rule of law related complaints mostly lodged by Polish judges communicated to Polish authorities by the Strasbourg Court. In its most recent judgment to date, the European Court of Human Rights found inter alia that the 'Disciplinary Chamber' does not constitute a tribunal established by law within the meaning of Article 6(1) ECHR.²⁰³ We will therefore refer to this judgment in our analysis of the Court of Justice's judgment in Case C-791/19 as the same body was also one of the core problematical issues raised by the European Commission in its third infringement action relating to Poland's rule of law crisis.

At the time of finalising this study, both the judgment of the Court of Justice of 15 July 2021 in Case C-791/19 and the judgment of the European Court of Human Rights of 22 July 2021 in the Case of *Reczkowicz v. Poland* continue to be openly ignored by Polish authorities and Polish judges subject to arbitrary disciplinary proceedings when they attempt to implement them. As far as the EU is concerned, in an unprecedentedly prompt (and entirely warranted) reaction, the European Commission has sent a letter of formal notice to Polish authorities under Article 260(2) TFEU paving the way for the ECJ to eventually impose a lump sum and/or penalty payment on Polish authorities should they not take the necessary measures to comply fully with the Court of Justice's judgment of 15 July 2021.²⁰⁴

²⁰⁰ See *supra* Section 3.1.1.

²⁰¹ EU:C:2021:596.

²⁰² See Section 4 *infra* for an analysis of Joined Cases C-585/18, C-624/18 and C-625/18 and Joined Cases C-558/18 and C-563/18 and Section 6 *infra* for an analysis of Case C-824/18.

²⁰³ See Judgment of 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719.

²⁰⁴ Independence of Polish judges: Commission asks European Court of Justice for financial penalties against Poland on the activity of the Disciplinary Chamber, IP/21/4587, 7 September 2021: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4587>

JUDGMENT OF THE COURT (Grand Chamber)
15 July 2021
In Case C-791/19,
ACTION for failure to fulfil obligations under Article 258 TFEU
European Commission v. Poland (Disciplinary regime for judges)

[For ease of reading, references to previous cases have been omitted]

Excerpts:

62 Having regard to the foregoing, the national rules regarding disciplinary proceedings called into question by the Commission in the first four complaints are amenable to review in the light of the second subparagraph of Article 19(1) TEU and it is therefore necessary to examine whether the infringements of that provision alleged by that institution are established.

[...]

112 Having regard to all the considerations set out in paragraphs 89 to 110 of the present judgment, it must be held that, taken together, the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber, and the way in which its members were appointed are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it and, thus, are likely to lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals. Such a development constitutes a reduction in the protection of the value of the rule of law for the purposes of the case-law of the Court referred to in paragraph 51 of the present judgment.

113 It follows, inter alia, that, by failing to guarantee the independence and impartiality of the Disciplinary Chamber which is called upon to rule, at first instance and at second instance, in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and, depending on the case, either at second instance or both at first instance and at second instance, in disciplinary cases concerning judges of the ordinary courts and by thereby undermining the independence of those judges at, what is more, the cost of a reduction in the protection of the value of the rule of law in that Member State for the purposes of the case-law of the Court referred to in paragraph 51 of the present judgment, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

[...]

155 Even though the Republic of Poland contends that the complaints made by the Disciplinary Officer in those cases do not concern obvious and gross violations of the law for the purposes of Article 107 § 1 of the Law on the ordinary courts, but the exceeding, by the judges concerned, of their jurisdiction or the bringing into disrepute by those judges of their judicial office, the fact remains that those complaints are directly related to the content of the judicial decisions taken by those judges.

156 The mere prospect of such disciplinary investigations being opened is, as such, liable to exert pressure on those who have the task of adjudicating in a dispute.

157 Having regard to all the foregoing considerations, the Court considers it to be established that, in the particular context resulting from the recent reforms that have affected the Polish judiciary and the disciplinary regime applicable to judges of the ordinary courts, and in particular having regard to the fact that the independence and impartiality of the judicial body with jurisdiction to rule in disciplinary proceedings concerning those judges are not guaranteed, the definitions of disciplinary offence contained in Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not help to avoid that disciplinary regime being used in order to create, with regard to those judges who are called upon to interpret and apply EU law, pressure and a deterrent effect, which are likely to influence the content of their decisions. Those provisions thus undermine the independence of those judges and do so, what is more, at the cost of a reduction in the protection of the value of the rule of law in Poland within the meaning of the case-law referred to in paragraph 51 of the present judgment, in breach of the second subparagraph of Article 19(1) TEU.

[...]

172 In the present case, it should be observed that the provisions of national legislation challenged by the Commission in the context of the present complaint confer on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear a disciplinary case conducted in respect of a judge of the ordinary courts without the criteria to be fulfilled by such a designation having been specified in the applicable legislation.

173 As has been argued by the Commission, where no such criteria have been laid down, such a power could, inter alia, be used in order to direct certain cases to certain judges while avoiding assigning them to other judges, or in order to put pressure on the judges thus designated.

174 In the present case, as has also been argued by the Commission, such a risk is increased by the fact that the person responsible for designating the disciplinary tribunal with territorial jurisdiction is none other than the President of the Disciplinary Chamber, namely the body called upon to hear, as the court of second instance, appeals brought against decisions issued by that disciplinary tribunal, a disciplinary chamber whose independence and impartiality are not guaranteed, as is apparent from paragraphs 80 to 113 of the present judgment.

[...]

176 It follows from all of the foregoing that Article 110 § 3 and Article 114 § 7 of the Law on the ordinary courts, inasmuch as they confer on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with territorial jurisdiction to hear disciplinary proceedings in respect of judges of the ordinary courts, that is to say, judges who may be called upon to interpret and apply EU law, do not meet the requirement derived from the second subparagraph of Article 19(1) TEU that such cases must be examined by a tribunal ‘established by law’.

[...]

213 National procedural rules, such as those covered by the second part of the present complaint, may, especially where, as in the present case, they are applied in the context of a disciplinary regime displaying the shortcomings referred to in paragraph 188 of the present judgment, prove to be such as to increase still further the risk of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions. The judges concerned may be led to fear, if they rule in a particular way in the cases before them, that disciplinary proceedings will be brought against them which thus fail to provide guarantees capable of meeting the requirements of a fair trial and, in particular, the requirement relating to respect for the rights of the defence. In this way, the restrictions on the rights of the defence arising from those procedural rules undermine the independence of judges of the Polish ordinary courts and thus do not meet the requirements derived from the second subparagraph of Article 19(1) TEU.

214 In those circumstances, the second part of the fourth complaint must also be upheld and, accordingly, the fourth complaint must be upheld in its entirety.

[...]

229 In the present case, it must be borne in mind that it is already apparent from the examination which led the Court to uphold the first complaint

brought by the Commission that the definitions of the disciplinary offence contained in the provisions of Article 107 § 1 of the Law on the ordinary courts and Article 97 §§ 1 and 3 of the new Law on the Supreme Court do not meet the requirements derived from the second subparagraph of Article 19(1) TEU, since they give rise to the risk that the disciplinary regime at issue might be used for the purpose of creating, in respect of judges of the Polish ordinary courts, pressure and a deterrent effect which are likely to influence the content of the judicial decisions which those judges are called upon to give.

233 It must be borne in mind, in that regard, first, that strict compliance with Member State obligations derived from Article 267 TFEU is required in respect of all State authorities and, therefore, in particular, in respect of a body which, like the Disciplinary Officer, is responsible for investigating, if necessary under the authority of the Minister for Justice, disciplinary proceedings that may be brought against judges. Second, as has been argued by both the Commission and the Member States intervening in support of the form of order sought by that institution, the mere fact that the Disciplinary Officer conducts investigations under the conditions referred to in paragraph 231 of the present judgment is sufficient to give concrete expression to the risk of forms of pressure and of a deterrent effect referred to in paragraph 229 of the present judgment and to undermine the independence of the judges who are the subject of those investigations.

234 It follows that the fifth complaint, alleging that the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, must be upheld.

Analysis²⁰⁵

This new disciplinary regime for judges forms part of an autocratic agenda which, in manifest violation of EU law but also the Polish Constitution, endeavours to put an end to judicial independence and reinstates what amounts to a ‘Soviet-style justice system’.²⁰⁶ Unsurprisingly, the ECJ found each element

²⁰⁵ The text below draws upon L. Pech, ‘Protecting Polish Judges from Political Control: A brief analysis of the ECJ’s infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law)’, *VerfBlog*, 20 July 2021: <<https://verfassungsblog.de/protecting-polish-judges-from-political-control/>>

²⁰⁶ Batory Foundation and ESI, *Poland’s deepening crisis. When the rule of law dies in Europe*, 14 December 2019, p. 3: ‘The Polish case has become a test whether it is possible to create a Soviet-style justice system in an EU member state; a system where the control of courts, prosecutors and judges lies with the executive and a single party’.

of this new regime submitted to its attention by the Commission, supported by the governments of 5 EU Member States (Belgium, Denmark, Netherlands, Finland, Sweden), to be wholly incompatible with EU law:

- (i) The Disciplinary Chamber is not compatible with the second subparagraph of Article 19(1) TEU as it does not provide required guarantees of impartiality and independence;
- (ii) The new disciplinary regime is not compatible with the second subparagraph of Article 19(1) TEU to the extent that it allows the content of judicial decisions to be classified as a disciplinary offence;
- (iii) By failing to guarantee that disciplinary cases are examined by a tribunal established by law, the new disciplinary regime also violates the second subparagraph of Article 19(1) TEU;
- (iv) Poland's failure to guarantee that disciplinary cases brought against judges are examined within a reasonable time and guarantee respect for the rights of defence of accused judges amounts to an additional violation of the second subparagraph of Article 19(1) TEU;
- (v) By exposing judges to disciplinary proceedings should they make a reference for a preliminary ruling to the Court of Justice raising judicial independence issues, Poland has also violated Article 267 TFEU.

Before doing so, the Court's detailed judgment offered helpful summaries of the fundamental principles governing judicial independence, in particular, as further developed in two important cases decided a few weeks before and informally known as the *Maltese judges*²⁰⁷ and *Romanian judges*²⁰⁸ rulings.

Fundamental guiding principles

With respect to the applicability and scope of the second subparagraph of Article 19(1) TEU, the Court recalled that this provision requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law irrespective of whether the Member States are implementing

²⁰⁷ Case C-896/19 *Repubblika*, EU:C:2021:311. For further analysis, see M. Leloup, D. Kochenov and A. Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*' (2021) 46 *European Law Review* 687.

²⁰⁸ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393. For further analysis, see A. Dimitrovs and D. Kochenov, 'Of Jupiters and Bulls: CVM as a Redundant Special Regime of the Rule of Law – *Romanian Judges*', *EU Law Live*, 5 June 2021.

Union law within the meaning of Article 51(1) of the Charter, which means inter alia ensuring that the national bodies which may be called upon to rule on questions concerning the application or interpretation of EU law are and remain independent. The fact that the organisation of justice in the Member States falls within the competence of those Member States does not mean that national authorities, when exercising that competence, can disregard their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU. As made clear in the *Maltese judges* ruling of 20 April 2021, EU Member States are furthermore subject to a non-regression obligation which means that national authorities cannot amend national laws ‘in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges.’²⁰⁹

As regards specifically the rules governing the disciplinary regime applicable to judges, the requirement of independence derived from EU law, and, in particular, from the second subparagraph of Article 19(1) TEU, means inter alia an obligation for Member States to make sure that the national disciplinary regime provides 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. In more practical terms, this requires rules which clearly and precisely ‘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 of the Charter, in particular the rights of the defence, and lay down the possibility of bringing legal proceedings challenging the disciplinary bodies’ decisions.’²¹⁰ In this respect, the Court has emphasised that the mere ‘prospect of opening a disciplinary investigation is, as such, liable to exert pressure on those who have the task of adjudicating in a dispute’²¹¹ and as such, the disciplinary regime must guarantee that those conducting investigations and bring disciplinary proceedings act objectively and impartially free from any external influence. In short, any national disciplinary regime which is used as an instrument of pressure, intimidation or political control over, the judicial activity of judges as well as prosecutors, cannot be compatible with EU law.

²⁰⁹ C-791/19, op. cit., para. 51.

²¹⁰ Joined Cases C-83/19 et al., op. cit., para. 198.

²¹¹ Ibid., para. 199.

Application of these principles

Before briefly outlining how the principles were applied by the Court in relation to Poland's new disciplinary regime for judges, the Court's adoption of a systemic framework of analysis in answer to a systemic attack on judicial independence must be noted. While this is not the first time the Court has done so,²¹² the Court's systemic analysis is particularly thorough, and one must commend the Court for its contextual analysis which took account i.a. of the *wider context* of the changes made to the organisation of the judiciary (para. 88) and the *particular context* in which e.g. the Disciplinary Chamber was created (paras 112 and 157).

Among the most noteworthy aspects of the Court's infringement judgment is the Court's first direct answer to the question of whether the Disciplinary Chamber is compatible with EU law and the 'new' (unconstitutionally established) National Council of Judiciary (NCJ) sufficiently independent. For the Court, numerous factors highlighted in its judgment 'are such as to give rise to legitimate doubts as to the independence' of the NCJ (para. 108) and considering the important role of this body in appointing the members of the Disciplinary Chamber not to mention the characteristics of that chamber (e.g. its membership), it must be held that the Disciplinary Chamber does not provide the guarantees of impartiality and independence required under the second subparagraph of Article 19(1) TEU.

Simultaneously, and for the first time too, the Court has found a violation of the principle of non-regression in relation to the DC, taking into account i.a. the role played by the new NCJ in the appointment of the members of the DC. While one may regret the ECJ's arguably excessively euphemistic language in this context to refer to the premature termination, in manifest violation of the Polish Constitution, of the term of office of the members which had, until that point, made up that body, the ECJ did stress the lack of independence of the NCJ before holding that the DC 'constitutes a reduction in the protection of the value of the rule of law' (paras 112–113). This is, in essence, the first violation of the EU non-regression principle first outlined as regards judicial independence in the *Maltese Judges* ruling of 20 April 2021.

For the first time as well, the Court has directly and extensively dealt with the notion of deterrent effect (also known as chilling effect in ECHR law²¹³) to establish a violation of the principle of judicial independence in an infringement case. In agreement with the Member States which intervened in support of

²¹² See the Court's judgment of 2 March 2021 in Case C-824/18 *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153 which is examined in Section 6 *infra*.

²¹³ L. Pech, *The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU*, March 2021: <<https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect>>

the Commission, the Court indeed held that Polish authorities have created a disciplinary regime which is a ‘regime being used in order to create, with regard to those judges who are called upon to interpret and apply EU law, *pressure and a deterrent effect* [our emphasis], which are likely to influence the content of their decisions’ (para. 157). In this context, the Court, in yet another unprecedented feature, found a second violation of the principle of non-regression while also holding that the national measures relating to the disciplinary liability of judges, having regard to their wording alone, violate the requirements of clarity and precision previously outlined in the *Romanian Judges* ruling of 18 May 2021 in relation to national rules providing for the personal liability of judges.²¹⁴

In another first, the Commission had positively requested to assess a specific aspect of the disciplinary regime in light of the right to a tribunal established by law. The Commission however did so in a very (arguably excessively) limited way. Indeed, it regrettably did not ask the ECJ to review ‘the conditions under which the Polish disciplinary courts are established or the judges which make up those courts are appointed, but the conditions under which the disciplinary court is designated which ... will be called upon to rule in specific disciplinary proceedings conducted in respect of a judge’ (para. 170). A missed opportunity to tackle the issue of Poland’s fake judges in an infringement context. In any event, the ECJ, for the first time, found a violation of the established by law criterion in this context due to the arbitrary power conferred on the individual presiding the Disciplinary Chamber.

In yet another unprecedented development, the Court held that relevant national *procedural* rules were designed in such a way as ‘to increase still further the risk of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions’ with the Court noting explicitly that Polish judges are right ‘to *fear* [our emphasis], if they rule in a particular way in the cases before them, that disciplinary proceedings will be brought against them which thus fail to provide guarantees capable of meeting the requirements of a fair trial’ (para. 213). This naturally amounts to yet another violation of the requirements derived from the second subparagraph of Article 19(1) TEU.

Last but not least, in relation to Article 267 TFEU, the Court has essentially moved away from its previous unwise distinction between preliminary disciplinary investigations and formal opening of disciplinary investigations. Positively, the Court now fully accepts that the mere ‘opening of investigations concerning decisions whereby Polish ordinary courts have submitted requests for a preliminary ruling’ (para. 213) is not compatible with EU law. Again and fittingly, the Court relies i.a. on the concept of chilling effect in this context.

²¹⁴ Joined Cases C-83/19 et al., op. cit., paras 234–235.

One arguably very minor yet annoying aspect: the Court's continuing use of 'reforms' to describe deliberate, sustained, unlawful attacks on judicial independence.

Strasbourg Court's additional blow

A week following the Luxembourg Court's judgment finding the core aspects of Poland's new disciplinary regime for judges incompatible with EU law, the Strasbourg Court delivered a judgment which one may view as even more stunning if not damning than the Court of Justice's. Indeed, while the Court of Justice focused on the lack of independence of the Disciplinary Chamber, the European Court of Human Rights found that this body is and never was a tribunal established by law due to 'the irregularities in the appointment process' which 'compromised the legitimacy of the Disciplinary Chamber to the extent that, following an inherently deficient procedure for judicial appointments, it did lack and continues to lack the attributes of a "tribunal" which is "lawful" for the purposes of Article 6 § 1. The very essence of the right at issue has therefore been affected'.²¹⁵

Prior to this finding, the Strasbourg Court found that the NCJ no longer offered sufficient guarantees of independence from the legislature and the executive powers and the impugned appointment procedure of the members of the DC was 'inherently tarnished' by grave breaches of the domestic procedure for the appointment of judges which itself arose from non-compliance with the principle of the separation of powers and the independence of the judiciary.²¹⁶ To put it differently, 'the Strasbourg court found that the defects of the NCJ led to the Disciplinary Chamber, formed with its participation, to be effectively poisoned'.²¹⁷ Since the same problem has affected multiple other appointments to other chambers of Poland's Supreme Court, one may expect the Strasbourg Court to similarly find against other judgments issued by individuals who were appointed by Polish President Duda in a similarly 'inherently deficient procedure' which discloses i.a. an undue influence of the legislative and executive powers and a complete disregard for court orders.²¹⁸ Be that as it may, the EU law aspects raised by the fundamental irregularities committed by Polish

²¹⁵ See judgment of 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, para. 280.

²¹⁶ *Ibid.*, para. 276.

²¹⁷ J. Jaraczewski, 'Not a lawful tribunal at all – the ECtHR's judgment in *Reczkowicz v. Poland*', *EU Law Live*, 26 July 2021: <<https://eulawlive.com/op-ed-not-a-lawful-tribunal-at-all-the-ecthrs-judgment-in-reczkowicz-v-poland-by-jakub-jaraczewski/>>

²¹⁸ In order to create *faits accomplis*, the Polish President *deliberately* violated several freezing orders adopted by Poland's Supreme Administrative Court in relation to different resolutions of the new (unconstitutionally re-established) NCJ recommending multiple candidates to different chambers of the Supreme Court. See judgment of 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, paras 36–42 and paras 173–174 (offering excerpts from AG Tanchev Opinion in Case C-487/19).

authorities in their ongoing attempt to capture Poland's Supreme Court will be further discussed in Section 6. Before doing so, we will offer an analysis of two key preliminary ruling judgments which requested the Court of Justice to clarify its interpretation of the obligation to ensure that national courts meet the requirement of effective judicial protection.

4 Interpretation of the obligation to ensure that national courts meet the requirements of effective judicial protection

This section focuses on what we view as the two most important rulings to date issued by the Court of Justice in response to national requests for a preliminary ruling originating in both instances from Polish courts in relation to the requirements of judicial independence under Article 19(1) TEU, second paragraph, and/or Article 47 CFR:

- (i) Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. e.a. (Independence of the disciplinary chamber of the Supreme Court)*;²¹⁹ and
- (ii) Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*.²²⁰

A third significant preliminary ruling regarding the rule of law situation in Poland – Case C-824/18 *A.B. et al. (Appointment of judges to the Supreme Court – Actions)*²²¹ – will be analysed *infra* in Section 6, as it primarily relates to the unprecedented and difficult issue of how to address grave irregularities which marred the appointment of multiple individuals to Poland’s Supreme Court. The extent to which EU law, and in particular the right to an *independent* tribunal *established by law*, can and has been relied upon in this context, will be examined then. The Court of Justice is furthermore bound to have to answer additional problems such as the lack of independence of the Poland’s new Chamber of Extraordinary Control and Public Affairs, as there are still a considerable number of pending preliminary ruling requests originating from Polish judges raising multiple and yet to be answered issues, as the diagram below shows.

²¹⁹ EU:C:2019:982.

²²⁰ EU:C:2020:234.

²²¹ EU:C:2021:153.

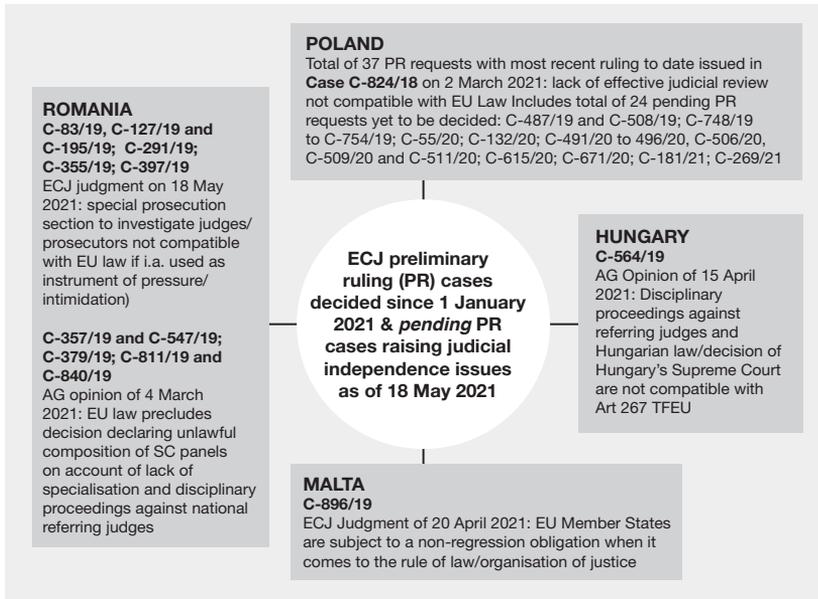
Table 3 Requests for a preliminary ruling made by Polish courts raising rule of law issues

Requests for a preliminary ruling (Article 267 TFEU) made by Polish courts raising rule of law issues

(Total of 37 requests with 24 pending as of 8 July 2021)

<p>Questions from POLISH SUPREME COURT (SC) (not yet captured chambers with the exception of C-132/20)</p> <p>Case C-522/18 (lodged on 9 August 2018): Main issue was retroactive lowering of SC retirement age but case closed on 29 Jan 2020 due to entry into force of law adopted on 21 Nov 2018</p> <p>Case C-537/18 (lodged on 17 Aug 2018): Main issue was lack of independence of the SC's 'Disciplinary chamber' (DC) but case closed on 3 Feb 2020 due to ECJ ruling in C-585/18 et al</p> <p>Joined Cases C-535/18, C-624/18 & C-625/18 (lodged on 29 Sept & 3 Oct 2018; AG Opinion on 27 June 2019, ECJ ruling on 19 Nov 19): Referring court to confirm that the DC lacks independence which the referring court did (ECJ and national judgments systemically violated since)</p> <p>Case C-668/18 (lodged on 26 Oct 2018; expedited procedure granted on 11 Dec 2018): same key issue as in C-522/18 but case closed on 3 Dec 2019 following withdrawal of PR request</p> <p>Case C-487/19 and Case C-508/19 (lodged on 26 June and 3 July 2019 with AG opinions on 15 April 2021): For AG Tanchev, referring court to confirm the two new SC chambers do not comply with EU Law as their members were appointed in flagrant breach of relevant national rules</p> <p>Case C-132/20 (lodged on 10 March 2020 by individual whose appointment to SC was marred by grave irregularities, AG Opinion on 8 July 2021): For AG Bobek, request is admissible as long as SC has not been hijacked</p> <p>Cases C-491/20 to 496/20, C-506/20, C-509/20 and C-511/20 (total of 9 requests from Labour Chamber lodged on 24 Sept 2020): several questions raising i.a. issues of individuals unlawfully appointed to SC, 'muzzle law', etc.</p>	<p>Questions from POLISH DISTRICT/REGIONAL COURTS (not yet captured)</p> <p>Joined Cases C-558/18 & C-563/18 (Lodged on 3 and 5 Sept 2018; Hearing on 18 June 2019; AG Opinion on 24 Sept 2019; ECJ judgment on 26 March 2020): Questions concerning new disciplinary regime for judges are inadmissible with ECJ however holding that the mere prospect of disciplinary proceedings against referring judges not compatible with EU law (principle systematically violated since)</p> <p>Case C-623/18 (lodged on 3 Oct 2018; ECJ order on 6 Oct 2020): Questions concerning new disciplinary regime for judges are inadmissible</p> <p>Cases C-748/19 to C-754/19 (Total of 7 requests lodged on 15 Oct 2019, AG Opinion on 20 May 2021): For AG Bobek, Polish regime regarding 'seconded judges' is not rule of law compliant and not compatible with EU law</p> <p>Case C-615/20 (lodged on 18 Nov 2020) and Case C-671/20 (lodged on 9 Dec 2020): Questions by Judge Tuleya re his suspension & waiving of judicial immunity by ECJ-suspended DC and questions by another judge following reallocation of cases previously allocated to Judge Tuleya</p> <p>Case C-181/21 (lodged on 23 March 2021) and C-269/21 (lodged on 27 April 2021): Questions by Judge Markiewicz and Judge Zurek re status of individuals appointed by the 'new' NCJ due i.a. to the lack of independence this body</p>
<p>Questions from POLISH SUPREME ADMINISTRATIVE COURT (not yet captured)</p> <p>Case C-824/18 (lodged on 28 Dec 18; AG Opinion on 17 Dec 2020; Judgment on 2 March 2021): Referring court to confirm that Polish amendments re NCJ violates Arts 4(3) TEU, 19(1) TEU and 267 TFEU & that the 'new' NCJ itself lacks independence</p>	<p>Questions from POLISH COURT OF APPEAL (not yet captured)</p> <p>Cases C-763/19 to C-765/19 (lodged on 18 Oct 2019; order of 7 May 2020): Questions withdrawn re status of individuals appointed to SC & status of rulings rendered by these individuals following resolution of Poland's SC of 23 Jan 2020</p>
	<p>Questions from Disciplinary Court of Bar Association (Warsaw) (not yet captured)</p> <p>Case C-55/20 (lodged on 31 Jan 2020, AG Opinion on 17 June 2021): For AG Bobek, EU Services Directive applies to disciplinary proceedings against lawyers</p>

Table 4 Preliminary ruling cases raising judicial independence issues decided by the Court of Justice since 1 January 2021 and pending cases



Looking beyond Poland, we are observing a new trend in EU constitutionalism, where national courts are increasingly turning to the Court of Justice, essentially to ask for help in resisting national measures which seek to undermine their own independence. In addition to the many requests originating from Polish courts, we have seen an increasing number of requests for preliminary rulings raising fundamental judicial independence issues originating from courts located in other EU countries.

The unity of the EU judiciary and the direct access to the Court of Justice organised by Article 267 TFEU is thus mobilised to serve the ends of the protection and reinforcement of the rule of law. To put it more informally, national courts have been imploring the Court of Justice to come to their rescue while being subject to attacks of the executive against the independence of the judiciary as a whole, and in some instances, attacks targeting individual judges as well.²²²

²²² Before Article 19(1) TEU emerged as a jurisdictional bridge, reliance on EU citizenship rights had been suggested to address democratic and rule of law backsliding at Member State level: A. von Bogdandy et al., 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489; A. von Bogdandy et al., 'Protecting EU Values, Reverse *Solange* and the Rule of Law Framework', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017). But see J. Croon-Gestefeld, 'Reverse *Solange* – Union Citizenship as a Detour on the Route to European Rights Protection against National Infringements', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: CUP, 2017).

In essence, this development signals a new, arguably historically unexpected, employment of the preliminary ruling procedure which has been a key stepping stone in the development of the EU's multi-layered constitutionalism almost since the inception of the European Communities.²²³ In a context where the Commission appears keen to use infringement actions in the most parsimonious possible way, Article 267 TFEU has emerged as a tool of self-defence for the national judges under attack and thus serves as an instrument of enforcement of the EU's values of Article 2 TEU.²²⁴ The effectiveness of the preliminary ruling procedure in this context is however limited due to the problems which will be highlighted in this Section, and in particular, the more limited jurisdiction of the Court of Justice under Article 267 TFEU when compared to the Court's jurisdiction under Article 258 TFEU. That said, the Court will soon be provided with more opportunities to defend judicial independence 'negatively' by eventually refusing to answer questions from compromised courts and/or individuals masquerading as judges.²²⁵

Due to the already lengthy nature of the present study, we will not offer an overview of the increasing number of pending preliminary ruling requests originating from EU countries other than Poland, which in essence also are asking for the Court's help to defend their judicial independence. The Court's judgments in the *Maltese Judges* and *Romanian Judges* cases have however already been briefly addressed when analysing the Court's infringement judgment regarding Poland's new disciplinary regime for judges in Section 3 and will also be alluded to when considering the issue of Poland's 'fake judges' in Section 6. Suffice for now to stress that the Court's preliminary judgments in *Maltese Judges* and *Romanian Judges* strongly reiterate that national authorities are under a positive obligation but also a negative obligation to respect EU requirements relating to judicial independence. This means inter alia an obligation to refrain from adopting legislative changes which undermine the rule of law, which is the case when, for instance, a new special prosecution section is established and is used as an instrument of pressure and intimidation with regard to judges.²²⁶

²²³ See e.g. M. Broberg and N. Fenger, *Preliminary References to the Court of Justice of the European Union* (2nd ed. Oxford: OUP, 2014).

²²⁴ See M. Broberg, 'Preliminary References as a Means for Enforcing EU Law' in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: OUP, 2017), 107.

²²⁵ See *infra* Section 6 which deals inter alia with the pending Case C-132/20, lodged with the Court on 10 March 2020 by an individual which we view as having been manifestly irregularly appointed to Poland's Supreme Court.

²²⁶ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, EU:C:2021:393.

4.1 The beginning of the end for Poland's 'Disciplinary Chamber' and neo-'National Council for the Judiciary': Joined cases C-585/18, C-624/18 and C-625/18, A. K. e.a. (Independence of the disciplinary chamber of the Supreme Court)²²⁷

These joined cases provoked the ire of Polish authorities as soon as they were lodged with the Court of Justice. Indeed, they were concerned, not unjustifiably, that these preliminary requests would offer the Court the first opportunity to indicate the extent to which, if at all, two of its most emblematic mislabelled 'reforms' were compatible with the principle of judicial independence.

In his comprehensive Opinion delivered on 27 June 2019, AG Tanchev concluded *inter alia* that the newly-created 'Disciplinary Chamber' (hereinafter: DC), but also any chamber which would present the same features, does not satisfy the requirements of judicial independence.²²⁸ AG Tanchev furthermore clarified his view that the neo-National Council of the Judiciary (hereinafter: neo-NCJ), which succeeded the previous one following a premature and manifestly *unconstitutional* termination of the four-year mandates²²⁹ is not guaranteed to be independent from the legislative and executive authorities.

As will be shown below, the Court adopted the AG's reasoning but left it to the referring court to decide both whether the new DC is independent and whether the involvement of Poland's neo-NCJ (KRS in Polish which is the abbreviation used by the Court of Justice in its judgments) in this context can be a mitigating factor provided that this body may be regarded as being itself sufficiently independent of the legislature and the executive. Subsequently to this judgment, the Court of Justice adopted an interim order in Case C-791/19 R on 8 April 2020 which also concerns the DC. As previously analysed, the Polish authorities not only failed fully to comply with this order, they also legislated to deny any legal force to the *AK* preliminary ruling outlined below. Subsequently, and to add insult to injury, the DC, unlawfully decided to void the *AK* preliminary

²²⁷ EU:C:2019:982. For further analysis, see especially M. Leloup, 'An Uncertain First Step in the Field of Judicial Self-Government' (2020) 16 *European Constitutional Law Review* 1.

²²⁸ EU:C:2019:551.

²²⁹ As noted by the European Commission in its Article 7(1) TEU reasoned proposal, 'the premature termination also raises constitutionality concerns, as underlined in the opinion of the National Council for the Judiciary, of the Supreme Court and of the Ombudsman', *op. cit.*, recital 140. At the time of writing, Poland's National Council for the Judiciary (KRS in Polish) is due to be expelled from the European Network of Councils for the Judiciary (ENCJ): see ENCJ, *Draft Position Paper of the Executive Board of the ENCJ on the membership of the KRS (expulsion)*, 22 April 2020, at 5: 'On the basis of both its actions and its responses the Executive Board concludes that the KRS is not independent of the Executive and the Legislature'. In relation to the issue of the disciplining of judges for referring preliminary questions to the Court of Justice, the report states at 6 that the neo-KRS has also violated EU law 'by actively supporting the disciplinary prosecution of judges who decided in a judgement to ask preliminary questions to the CJEU' and in doing so, 'the KRS is in violation of the ENCJ duty to defend the Judiciary'.

ruling by denying it any legal force within the Polish legal order.²³⁰ Considering the most recent order of the Court of Justice in Case C-204/21 R, suspending once again the DC, and the judgment of 22 July 2021 of the European Court of Human Rights in *Reczkowicz v. Poland*, both previously analysed, the DC can be considered a dead body walking.

JUDGMENT OF THE COURT (Grand Chamber)

19 November 2019

**In Joined Cases C-585/18, C-624/18 and C-625/18,
THREE REQUESTS for a preliminary ruling under Article 267 TFEU
from the Supreme Court (Labour and Social Insurance Chamber),
Poland), in the proceedings
A. K. v. Krajowa Rada Sądownictwa (C-585/18),
and
CP (C-624/18), *DO* (C-625/18) *v. Sąd Najwyższy*
third party: Prokurator Generalny**

[For ease of reading, references to previous cases have been omitted]

Excerpts:

131 In the present cases, the doubts expressed by the referring court concern, in essence, the question whether, in the light of the rules of national law relating to the creation of a specific court, such as the Disciplinary Chamber, and, in particular, pertaining to the jurisdiction granted to it, its composition and the circumstances and conditions surrounding the appointment of the judges called to sit on that court, the context of its creation and those appointments, such a court and the members sitting on it satisfy the requirements of independence and impartiality which must be met by a court under Article 47 of the Charter where that court has jurisdiction to rule on a case in which subjects of the law rely, as in the present cases, on an infringement of EU law that is to their detriment.

132 It is ultimately for the referring court to rule on that matter having made the relevant findings in that regard. It must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and

²³⁰ On 23 September 2020, the DC formally but *unlawfully* denied the validity of the *AK* judgment in Poland. See Iustitia, 'Disciplinary Chamber denies validity of CJEU Ruling', 2 October 2020: <<https://www.iustitia.pl/en/disciplinary-proceedings/3980-disciplinary-chamber-denies-validity-of-cjeu-ruling-and-intends-to-rule-in-the-case-of-waiving-igor-tuleya-s-immunity>>. To the best of our knowledge, this manifestly unlawful decision of this body previously found not to constitute a court under Polish and EU law by the independent judges of Poland's Supreme Court, has yet to be explicitly acknowledged by the Commission, let alone become the subject of an infringement procedure.

of acts adopted by the EU institutions. According to settled case-law, the Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions.

133 In that regard, as far as concerns the circumstances in which the members of the Disciplinary Chamber were appointed, the Court points out, as a preliminary remark, that the mere fact that those judges were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role.

134 However, it is still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges.

[...]

136 In the present cases, it should be made clear that Article 30 of the New Law on the Supreme Court sets out all the conditions which must be satisfied by an individual in order for that individual to be appointed as a judge of that court. Furthermore, under Article 179 of the Constitution and Article 29 of the New Law on the Supreme Court, the judges of the Disciplinary Chamber are, as is the case for judges who are to sit in the other chambers of the referring court, appointed by the President of the Republic on a proposal of the KRS, that is to say the body empowered under Article 186 of the Constitution to ensure the independence of the courts and of the judiciary.

137 The participation of such a body, in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective. In particular, the fact of subjecting the very possibility for the President of the Republic to appoint a judge to the Sąd Najwyższy (Supreme Court) to the existence of a favourable opinion of the KRS is capable of objectively circumscribing the President of the Republic's discretion in exercising the powers of his office.

138 However, that is only the case provided, inter alia, that that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal.

139 The degree of independence enjoyed by the KRS in respect of the legislature and the executive in exercising the responsibilities attributed to it under national legislation, as the body empowered, under Article 186 of the Constitution, to ensure the independence of the courts and of the judiciary, may become relevant when ascertaining whether the judges which it selects will be capable of meeting the requirements of independence and impartiality arising from Article 47 of the Charter.

140 It is for the referring court to ascertain whether or not the KRS offers sufficient guarantees of independence in relation to the legislature and the executive, having regard to all of the relevant points of law and fact relating both to the circumstances in which the members of that body are appointed and the way in which that body actually exercises its role.

141 The referring court has pointed to a series of elements which, in its view, call into question the independence of the KRS.

142 In that regard, although one or other of the factors thus pointed to by the referring court may be such as to escape criticism per se and may fall, in that case, within the competence of, and choices made by, the Member States, when taken together, in addition to the circumstances in which those choices were made, they may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable.

143 Subject to those reservations, among the factors pointed to by the referring court which it shall be incumbent on that court, as necessary, to establish, the following circumstances may be relevant for the purposes of such an overall assessment: first, the KRS, as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time; second, whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the legislature among candidates capable of being proposed inter alia by groups of 2 000 citizens or 25 judges, such a reform leading to appointments bringing the number of members of the KRS directly originating from or elected by the political authorities to 23 of the 25 members of that body; third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed KRS.

144 For the purposes of that overall assessment, the referring court is also justified in taking into account the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers, in particular if it does so in a way

which is capable of calling into question its independence in relation to the legislature and the executive.

[...]

146 Notwithstanding the assessment of the circumstances in which the new judges of the Disciplinary Chamber were appointed and the role of the KRS in that regard, the referring court may, for the purposes of ascertaining whether that chamber and its members meet the requirements of independence and impartiality arising from Article 47 of the Charter, also wish to take into consideration various other features that more directly characterise that chamber.

147 That applies, first, to the fact referred to by the referring court that this court has been granted exclusive jurisdiction, under Article 27(1) of the New Law on the Supreme Court, to rule on cases of the employment, social security and retirement of judges of the Sąd Najwyższy (Supreme Court), which previously fell within the jurisdiction of the ordinary courts.

148 Although that fact is not conclusive per se, it should, however, be borne in mind, as regards, in particular, cases relating to the retiring of judges of the Sąd Najwyższy (Supreme Court) such as those in the main proceedings, that the assignment of those cases to the Disciplinary Chamber took place in conjunction with the adoption, which was highly contentious, of the provisions of the New Law on the Supreme Court which lowered the retirement age of the judges of the Sąd Najwyższy (Supreme Court), applied that measure to judges currently serving in that court and empowered the President of the Republic with discretion to extend the exercise of active judicial service of the judges of the referring court beyond the new retirement age set by that law.

[...]

152 Although any one of the various facts referred to in paragraphs 147 to 151 above is indeed not capable, per se and taken in isolation, of calling into question the independence of a chamber such as the Disciplinary Chamber, that may, by contrast, not be true once they are taken together, particularly if the abovementioned assessment as regards the KRS were to find that that body lacks independence in relation to the legislature and the executive.

153 Thus, the referring court will need to assess, in the light, where relevant, of the reasons and specific objectives alleged before it in order to justify certain of the measures in question, whether, taken together, the factors referred to in paragraphs 143 to 151 above and all the other relevant findings of fact which it will have made are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the

Disciplinary Chamber to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive, and as to its neutrality with respect to the interests before it and, thus, whether they may lead to that chamber not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.

154 If the referring court were to conclude that that is the case, it would follow that such a court does not meet the requirements arising from Article 47 of the Charter and from Article 9(1) of Directive 2000/78 on account of its not being an independent and impartial tribunal, within the meaning of the former provision.

155 If that is the case, the referring court also wishes to know whether the principle of the primacy of EU law requires it to disapply those provisions of national law which confer jurisdiction to rule on the cases in the main proceedings on that court.

[...]

165 A provision of national law which granted exclusive jurisdiction to hear and rule on a case in which an individual pleads, as in the present cases, an infringement of rights arising from rules of EU law in a particular court which does not meet the requirements of independence and impartiality arising from Article 47 of the Charter would deprive that individual of any effective remedy within the meaning of that article and of Article 9(1) of Directive 2000/78, and would fail to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter.

166 It follows that, where it appears that a provision of national law reserves jurisdiction to hear cases, such as those in the main proceedings, to a court which does not meet the requirements of independence or impartiality under EU law, in particular, those of Article 47 of the Charter, another court before which such a case is brought has the obligation, in order to ensure effective judicial protection, within the meaning of Article 47, in accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, to disapply that provision of national law, so that that case may be determined by a court which meets those requirements and which, were it not for that provision, would have jurisdiction in the relevant field, namely, in general, the court which had jurisdiction, in accordance with the law then in force, before the entry into force of the amending legislation which conferred jurisdiction on the court which does not meet those requirements.

167 Furthermore, as regards Articles 2 and 19 TEU, provisions on which the referring court has also referred questions to the Court, it must be borne

in mind that Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court.

168 The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law which is now enshrined in Article 47 of the Charter, so that the former provision requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of the latter provision, in the fields covered by EU law.

169 In those circumstances, it does not appear necessary to conduct a distinct analysis of Article 2 and the second subparagraph of Article 19(1) TEU, which can only reinforce the conclusion already set out in paragraphs 153 and 154 above, for the purposes of answering the questions posed by the referring court and of disposing of the cases before it.

Analysis

Both the newly created DC and the newly recreated NCJ have been regularly and harshly criticised for their manifest rule of law deficiencies. According to the European Commission, for instance, the politicisation of the neo-NCJ has undermined 'its role as an effective safeguard of judicial independence' while 'the new election regime of the judges-members of the [KRS] does not comply with European standards requiring that judges-members of Councils for the Judiciary are elected by their peers'.²³¹

As regards the DC as well as another chamber, created at the same time and known as the Chamber of Extraordinary Control and Public Affairs, the European Commission, in its Article 7(1) TEU reasoned proposal of December 2017, stressed that 'these two new largely autonomous chambers composed with new judges raise concerns as regards the separation of powers [...] in practice they are above all other chambers, creating a risk that the whole judicial system will be dominated by these chambers which are composed of new judges elected with a decisive influence of the ruling majority'.²³² We could add that the Council of Europe standards on this matter are well-established and a self-governance body of the judiciary needs to be composed of a majority of judges chosen by their

²³¹ European Commission contribution for the hearing of Poland on 26 June 2018, Council document no 10351/18, 21 June 2018, at 7.

²³² Reasoned proposal, *op. cit.*, recital 135.

peers rather than handpicked by the executive.²³³ One may note in this respect that according to the 2020 EU Justice Scoreboard, Poland is now the only EU country where judges-members of the neo-NCJ are not proposed exclusively by judges and are appointed by the Parliament.²³⁴

AG Opinion and Polish authorities' reactions

In his Opinion delivered on 27 June 2019, AG Tanchev essentially agreed with the Commission's diagnosis and submitted that the DC does not meet the requirements of independence under EU law. He further opined that the intervention of the neo-NCJ in the selection process cannot be viewed as a mitigating factor but rather an aggravating one, due to a number of facts and factors which cast doubt on its independence from the legislative and executive authorities doubtful. Looking beyond the issues raised by the referring court, the AG also concluded that the 'situation arising in the main proceedings is one in which a Member State is implementing Article 47 of the Charter within the meaning of Article 51(1) thereof. Therefore, strictly speaking, it is not necessary for the Court to decide whether there has also been a breach more broadly of the second subparagraph of Article 19(1) TEU'.²³⁵ Indeed, 'in the framework of Article 47 of the Charter, as well as the second subparagraph of Article 19(1) TEU, the Court is engaging in a substantive assessment as to whether, in particular, the measure in question impairs judicial independence according to the requirements laid down by those provisions'.²³⁶

The reaction of Polish authorities to the Opinion of AG Tanchev was particularly unhinged. To offer but two edifying examples: the Polish Minister of Justice accused AG Tanchev of defending 'pathology in the Polish judiciary' (whatever this may mean), while the neo-NCJ, in a typically confused tirade, accused inter alia the AG of having produced a 'one-sided' opinion not meeting the 'standards of legal opinion' and fabricating legal standards just for the purposes of the then pending cases, while also accusing the AG of lacking independence.²³⁷ This behaviour was not entirely surprising in light of the neo-NCJ's previous assertions during the proceedings that the AG's Opinion was 'based on false premises'.²³⁸ Not to be outdone, the Polish government also claimed that the Opinion contained 'certain contradictions' and 'an erroneous interpretation

²³³ See ECtHR *Denisov v. Ukraine*, CE:ECHR:2018:0925JUD007663911; *Oleksandr Volkov v. Ukraine*, CE:ECHR:2013:0109JUD002172211. For further analysis, see D. Kosař (ed.), 'Judicial Self-Government in Europe' (2018) 19 *German Law Journal* (special issue).

²³⁴ European Commission, *2020 EU Justice Scoreboard*, p. 54.

²³⁵ AG Opinion in Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:551, para. 77.

²³⁶ *Ibid.*, para. 113.

²³⁷ A. Wojcik, 'Atak na rzecznika generalnego TSUE po miażdżącej ocenie "reform" sądownictwa PiS', *Oko.press*, 30 June 2019: <<https://oko.press/atak-na-rzecznika-generalnego-tsue-po-miazdzacej-ocenie-reformy-sadownictwa-pis/>>.

²³⁸ Joined Cases C-585/18, C-624/18 and C-625/18, *op. cit.*, para. 58

of the past case-law of the Court'.²³⁹ The unhinged behaviour of the neo-NCJ prompted the Court to reproach it in an unusual paragraph where the Court recalled that it was asked to submit observations within a specific timeframe but 'deliberately refrained' from doing so.²⁴⁰ We should furthermore note the unprecedented nature of the Polish General Prosecutor's recusal request directed at the President of the Court, Judge Koen Lenaerts,²⁴¹ seemingly because President Lenaerts publicly stressed the importance and the need to respect the rule of law at conferences in Poland. This crass request was unsurprisingly refused by the Court, then presided over by the Vice-President.

The Court's exclusive reliance on Article 47 CFR

Leaving aside what may be construed as unprecedented attempts to pressure both the AG and the Court, the preliminary ruling in *A.K.* (also known as *Independence of the disciplinary chamber of the Supreme Court* case) follows the AG's reasoning to a large extent. To begin with, in agreement with the AG, the Court held that both Article 47 CFR and the second paragraph of Article 19(1) TEU were applicable. However, considering its findings on the basis of Article 47 CFR, the Court decided not to conduct an additional analysis based on the second subparagraph of Article 19(1) TEU. Interestingly, the Court noted that any assessment on this basis would only *reinforce* the analysis it had previously adopted as to the imperviousness of the DC to external factors.

The Court also adopted the AG's reasoning in respect of the DC, assessed in light of Article 47 CFR with however one major difference: while the AG suggested that the Court should *directly* rule that the requirements of judicial independence laid down in Article 47 CFR should be interpreted as meaning that a body such as a DC composed of judges selected by a body such as the neo-NCJ does not satisfy those requirements, the Court decided to comprehensively outline the specific factors which the referring court will have to take into account when assessing the DC's compliance with the requirements of judicial independence. How could one explain this difference in approach? As the Court outlined in paragraph 132 of its ruling cited above, its jurisdiction within the framework of Article 267 TFEU is different from its jurisdiction within the framework of Article 258 TFEU. When answering preliminary ruling questions, the Court cannot directly apply rules of EU law to a particular case.

That said, the Court's interpretation of the law, in particular Article 47 CFR, building numerous connections with the dense case law of the European Court of Human Rights²⁴² and its meticulously detailed explanations regarding

²³⁹ *Ibid.*, para. 59.

²⁴⁰ *Ibid.*, para. 65.

²⁴¹ AG Opinion, op cit., para. 49.

²⁴² For further analysis and references, see L. Pech, 'Article 47(2)', in S. Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd ed. Oxford: Hart Publishing, forthcoming in 2021).

the factors and relevant findings of fact that the referring court may take into account, could lead to only one but inescapable conclusion: the DC is not a court due to manifest shortcomings of judicial independence, while the neo-NCJ itself cannot be said to offer sufficient independence from the executive and legislative authorities.²⁴³ It therefore came as no surprise to see the referring court conclude accordingly in its rulings of 5 December 2019 and 15 January 2020.²⁴⁴

These two rulings are summarised in the Court's interim relief order issued in Case C-791/19 R.²⁴⁵ This unusual summary of two national rulings in the context of an application for interim measures can be explained by the fact that Polish authorities and the DC itself have refused to comply with both. They also similarly defied a solemn resolution adopted on 23 January 2020 by the three (then still independent) chambers of Poland's Supreme Court, which held that the DC does not constitute a court under EU and Polish Law. This led the Supreme Court to find that the DC's past and future decisions 'deserve no protection'.²⁴⁶ As regards the neo-NCJ, the resolution is similarly scathing and concludes inter alia that it is 'structurally no longer independent', with any ruling issued by a bench composed of a 'judge' appointed or promoted by the neo-NCJ open to legal challenge post 23 January 2020 on Articles 47 CFR and 6 ECHR grounds.²⁴⁷

Unlawfully composed 'Constitutional Tribunal' and unconstitutional 'Disciplinary Chamber' to the rescue

In the immediate aftermath of the adoption of this resolution, the Polish government indicated that it would ignore it, with one deputy minister publicly declaring: 'I don't give a damn about these 60 professors, because I'm with the Polish People'.²⁴⁸ In order to enable the DC to disobey the Supreme Court's binding resolution and 'save' the neo-NCJ and the 'judges' it appointed or promoted from the consequences of this resolution, the unlawfully composed Constitutional Tribunal ('CT') got involved.

²⁴³ For the whole story, see A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19 *German Law Journal* 1839.

²⁴⁴ Case III PO 7/18 and Cases III PO 8/18 and 9/18.

²⁴⁵ Op. cit., paras 19–21, analysed *supra* in Section 2.3.

²⁴⁶ Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20, para. 55.

²⁴⁷ *Ibid.*, para. 40.

²⁴⁸ J. Cienski and Z. Wanat, 'Legal chaos descends on Poland', *Politico*, 24 January 2020: <<https://www.politico.eu/article/poland-legal-chaos-supreme-court-ruling/>>.

As expected, the CT duly did what Poland's ruling party expected it to: it unlawfully²⁴⁹ suspended the resolution of the Supreme Court on 23 January 2020, formally at the request of the Marshal of the Sejm (a member of the ruling party) before holding, in manifest breach of the Polish Constitution and EU law, that the resolution applying inter alia the ECJ's *AK* ruling was contrary to EU law.²⁵⁰ On these occasions, the CT was presided by its unlawfully appointed President with a bench which included three individuals masquerading as CT judges.²⁵¹ This shows, in passing, how bodies irregularly constituted attempt to bolster one another's legitimacy by providing a veneer of legality to what amount to obvious violations of EU law, including obvious defiance of the Court of Justice's rulings or orders.

The substantive violations of EU primary law committed by the captured CT are so many and so obvious that it is enough to stress that as a matter of EU law, this amounts to a grotesque usurpation of the exclusive jurisdiction of the European Court of Justice by a body – notwithstanding the CT's lack of competence to review the Supreme Court's resolution to begin with – which is no longer a court due to its irregular composition and lack of independence. This view was formally adopted by the Commission in its Article 7(1) reasoned proposal of December 2017 and importantly, reaffirmed in January 2020 by the Commission spokesman who publicly stated that the CT 'is no longer able to provide an effective constitutional review'.²⁵²

In these circumstances, the DC's decision – by then a body masquerading as a court whose decisions have no legal value and whose disciplinary functions had been suspended by the ECJ – to involve the CT and ask it to review the 'constitutionality' of the Court's interim order in Case C-791/19 R²⁵³ should be understood as a serious and deliberate act of defiance which is expected to culminate in a Poxexit from the Treaty provision providing that the Court of Justice 'may in any cases before it prescribe any necessary interim measures'.

²⁴⁹ See the Open letter by 22 former members of the CT, "Constitutional Tribunal has virtually been abolished," announce retired judges', *Rule of Law in Poland*, 11 February 2020: <<https://ruleoflaw.pl/constitutional-tribunal-has-virtually-been-abolished-announce-retired-judges/>>.

²⁵⁰ See M. Wilczek, 'Constitutional Tribunal rules in favour of Polish government against Supreme Court on judicial reform', *NFP*, 21 April 2020: <<https://notesfrompoland.com/2020/04/21/constitutional-tribunal-rules-in-favour-of-polish-government-against-supreme-court-on-judicial-reform/>>.

²⁵¹ See e.g. European Commission, Article 7(1) TEU reasoned proposal, op. cit., para. 57: 'The unlawful appointment of the President of the Constitutional Tribunal, the admission of the three judges nominated by the 8th term of the *Sejm* without a valid legal basis, the fact that one of these judges has been appointed as Vice-President of the Tribunal, the fact that the three judges that were lawfully nominated in October 2015 by the previous legislature have not been able to take up their function of judge in the Tribunal, as well as the subsequent developments within the Tribunal described above have *de facto* led to a complete recomposition of the Tribunal outside the normal constitutional process for the appointment of judges'.

²⁵² J. Cienski and Z. Wanat, 'Legal chaos', op. cit. A diagnosis shared by 22 former members of the CT: see open letter cited *supra*.

²⁵³ See press release of 10 April 2020 issued by the DC, no I DO 16/19.

But as noted above, this was not the first time unlawful, captured bodies are seeking to help one another to pre-empt EU action or organise non-compliance with the Court of Justice's rulings. With respect of *AK*, the neo-NCJ sought to pre-empt it by previously and *unlawfully* involving the *unlawfully* composed 'CT' which, in a 'judgment' of 25 March 2019 gave it a constitutional seal of approval as expected. However, and in line with well-established principles of EU law, the Court of Justice implicitly confirmed its agreement with the Commission's argument that the CT's decision of 25 March 2019 'is irrelevant for assessing the independence of the Disciplinary Chamber under EU law'.²⁵⁴ As previously observed by the AG, the CT's decision – even assuming that the CT was and is a proper lawfully composed court which it no longer is – does not indeed 'contain material relevant to the requirements of independence of the Disciplinary Chamber under EU law and, in any event, does not by itself remove all of the circumstances contributing to the impairment of the NCJ's independence'.²⁵⁵

Generally speaking, the Polish authorities' shenanigans to pre-empt and disobey *AK* offer a good insight in their modus operandi. As aptly summarised by Adam Bodnar, then Polish Commissioner for Human Rights, there is

an established pattern of legitimising one flawed authority by another flawed authority. The procedure for the review of constitutionality does not – today – serve to protect the Constitution, but to preserve measures that deny it [...] comprehensive changes in the Polish judicial system have led to **the exclusion of all safeguards designed to limit abusive or arbitrary action taken by the executive and/or legislative branches**. To put matters more bluntly: an alternative legal space has been created under which the ruling majority can enact unconstitutional laws, unlawfully appoint members of the Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court, or discipline and prosecute at will those who articulate positions that do not meet its expectations.²⁵⁶

The missing requirement: 'Established by law'

One key aspect, which *AK* did not unfortunately examine, concerns the 'established by law' requirement. This is arguably the key shortcoming of the Court of Justice's ruling.²⁵⁷ The Court could also have sought to take inspiration from the non-regression argument raised by the EFTA Surveillance Authority, which intervened in *AK* to argue that the DC is not an independent court within the meaning of Article 267 TFEU. Among other arguments, the EFTA

²⁵⁴ AG Opinion, para. 72.

²⁵⁵ *Ibid.*, para. 136.

²⁵⁶ Written comments of the Commissioner for Human Rights of the Republic of Poland in the case of *Jan Grzęda against Poland* (application no. 43572/18, case pending), 20 March 2021, paras 38 and 49.

²⁵⁷ For further discussion of this aspect, see *infra* Section 5.6 and Section 6.

Surveillance Authority interestingly asserted that not only must EU and EEA member states ‘organise their judicial systems in conformity with EU and EEA law’, with any changes they make to their judicial systems, ‘account should [also] be taken of a principle of non-regression of judicial independence’.²⁵⁸ According to the EFTA Surveillance Authority, this principle of non-regression of judicial independence can be derived from Articles 2, 7 and 49 TEU, Article 53 CFR and the Council of Europe’s European Charter on the statute of judges.²⁵⁹ We concur and it was therefore good to see the Court of Justice fully embrace the principle of non-regression when it comes to the rule of law in April 2021 in its *Maltese Judges* ruling.²⁶⁰

More minor shortcomings can also be noted, such as the Court’s continuing use of the word ‘reform’ which, in the context of Poland’s so-called ‘judicial reforms’ is akin to describing waterboarding as a spa treatment. This is obviously a minor and non-legal point, but the positive connotation of the word ‘reform’ to describe legal changes which blatantly violate the Polish Constitution, some of which have *already* been found to be in breach of the principles of judicial independence and of the irremovability of judges, is irksome as well as seriously misguided.²⁶¹ The Court could have also made better use of the Commission’s findings in its Article 7(1) TEU reasoned proposal and the European Network of Councils for the Judiciary (ENCJ)’s findings in relation to its suspension of neo-NCJ.²⁶²

These issues are not, however, anywhere near as crucial as the issue of whether the DC was established by law as a matter of EU law, and indirectly the issue of whether the members of the DC (and other individuals appointed on the basis of manifestly irregular procedures to the Supreme Court) are, in fact, judges *tout court*. From a matter of ECHR law, one should however note that the European Court of Human Rights has, at last, found in *Reczkowicz v. Poland* that the procedure for appointing ‘judges’ to the DC had been unduly influenced by the legislative and executive powers, a fundamental irregularity which compromised

²⁵⁸ AG Opinion, para. 69.

²⁵⁹ 8–10 July 1998, DAJ/DOC (98)23, point 1.1: ‘The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.’

²⁶⁰ The Court’s judgment of 20 April 2021 in Case C-896/19 is briefly analysed *supra* in Section 3.2.3 and *infra* in Section 6.

²⁶¹ It was therefore good to see AG Tanchev Opinion not using the word ‘reform’ once – with the more neutral word ‘change’ used instead – in his Opinion delivered on 6 May 2021 in Case C-791/19, EU:C:2021:366.

²⁶² The ENCJ has convened an extraordinary general assembly on 28–29 October 2021 to vote on the expulsion of Poland’s neo-NCJ due to the lack of ‘improvements in the way the KRS fulfils its duty to guarantee the independence of the judiciary’: ‘ENCJ convenes an extraordinary general assembly to vote on KRS expulsion’, 17 September 2021: <<https://www.encj.eu/node/603>>

the legitimacy of this body which lacked and continues to lack the attributes of a tribunal which is lawful.²⁶³ We will return to the growing problem of Poland's 'fake judges' in Section 6 of this casebook. Before doing so, the crucial issue of disciplinary proceedings targeting referring judges will be examined via an analysis of yet another important preliminary ruling, originating from two brave and independent Polish judges who had to face disciplinary investigations on account of their requests for a preliminary ruling: a then new and major threat to the functioning of the EU legal order which, as will be shown below, the Court could arguably have addressed more decisively, which the Court however did in its (infringement) judgment of 15 July 2021 in Case C-791/19 analysed *supra* in Section 3.2.

4.2 First warning not to harass Polish judges for submitting questions to the Court of Justice: Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny*²⁶⁴

These two cases originate from two Polish district courts. Possibly for the first time ever, these two national requests for a preliminary ruling were, in part, motivated by the referring judges' 'fear of retribution if they do not adjudicate in favour of the State, an apprehension which stems from abuse of the disciplinary process under the new regime'.²⁶⁵ And indeed, in yet another unprecedented and sinister development, the two referring judges 'were called to account for their decisions to submit the present requests for a preliminary ruling by way of investigation procedures which were initiated after those requests were made, even though disciplinary proceedings against those judges were not formally commenced'.²⁶⁶

While the Court of Justice ultimately found both requests inadmissible, the Court's reasoning is particularly instructive, with the ruling itself containing the strongest and clearest warning to date that Polish authorities must cease to threaten or expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling. As of today, this warning has remained unheeded by Polish authorities which subsequently rushed a piece of legislation known informally as the 'muzzle law', which prevents Polish courts from, inter alia, requesting preliminary rulings from the Court of Justice when the disputes before them concern judicial independence matters.²⁶⁷

²⁶³ J. Jaraczewski, 'Not a lawful tribunal at all – the ECtHR's judgment in *Reczkowicz v. Poland*', *EU Law Live*, 26 July 2021: <<https://eulawlive.com/op-ed-not-a-lawful-tribunal-at-all-the-ecthrs-judgment-in-reczkowicz-v-poland-by-jakub-jaraczewski/>>

²⁶⁴ EU:C:2020:234.

²⁶⁵ Opinion of Advocate General Tanchev delivered on 24 September 2019, EU:C:2019:775, para. 3.

²⁶⁶ *Ibid.*

²⁶⁷ European Commission, *Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*, Press release IP/20/772, 29 April 2020.

JUDGMENT OF THE COURT (Grand Chamber)

26 March 2020

In Joined Cases C-558/18 and C-563/18,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Łodzi (Regional Court, Łódź, Poland) (C-558/18) and from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) (C-563/18), made by decisions of 31 August 2018 and 4 September 2018, received at the Court on 3 September 2018 and

5 September 2018 respectively, in the proceedings

Miasto Łowicz v. Skarb Państwa – Wojewoda Łódzki,

intervening parties:

Prokurator Generalny, Rzecznik Praw Obywatelskich (C-558/18),

and

Prokurator Generalny v. VX, WW, XV (C-563/18)

[For ease of reading, references to previous cases have been omitted]

Excerpts:

15 According to those courts, it follows from all of the foregoing that, as regards the court decision which each of them is required to make in the dispute before them in the main proceedings, it is necessary to determine, first of all, whether the abovementioned national rules on the disciplinary regime for judges undermines the independence of those judges by depriving the litigants concerned of their right to an effective judicial remedy guaranteed by the second subparagraph of Article 19(1) TEU. That provision, read in conjunction with Article 2 and Article 4(3) TEU, requires the Member States to ensure that bodies, like the referring courts, which are empowered to rule on questions relating to the application or interpretation of EU law, satisfy the requirements inherent in the right to effective judicial protection; those requirements include the independence of those bodies which is of essential importance.

[...]

47 In that context, the task of the Court must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations. Whereas, in an action for failure to fulfil obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the specific dispute pending before that court.

48 In such proceedings, there must therefore be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court.

[...]

52 In those circumstances, it is not apparent from the orders for reference that there is a connecting factor between the provision of EU law to which the questions referred for a preliminary ruling relate and the disputes in the main proceedings, and which makes it necessary to have the interpretation sought so that the referring courts may, by applying the guidance provided by such an interpretation, make the decisions needed to rule on those disputes.

53 Those questions do not therefore concern an interpretation of EU law which meets an objective need for the resolution of those disputes, but are of a general nature.

[...]

54 As regards the circumstance, mentioned by the national courts [...], in which the two judges who made the present requests for a preliminary ruling were, as a result of those requests, the subject of an investigation prior to the initiation of potential disciplinary proceedings against them, it should be noted that the disputes in the main proceedings in respect of which the Court is requested to provide a preliminary ruling in the present joined cases do not relate to that circumstance. Moreover, it should be noted, as the Polish Government stated in its written observations and at the hearing before the Court, that those investigation proceedings have since been closed on the ground that no disciplinary misconduct, involving a failure to respect the dignity of their office as a result of making those requests for a preliminary ruling, had been established.

55 In that context, it is important to note, as is clear from the Court's settled case-law, that the keystone of the judicial system established by the Treaties is the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.

[...]

58 Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted. Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph.

59 For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence, which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU.

Analysis

This judgment does not add anything new as regards the Court's jurisdiction and the scope of application of the second subparagraph of Article 19(1) TEU. Faced with the claim repeated ad nauseam by Polish authorities that national provisions relating to the organisation of national courts and disciplinary measures relating to judges cannot be reviewed under EU law, the Court was however forced to reiterate that the second subparagraph of Article 19(1) TEU 'is intended inter alia to apply to any national body which can rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fall within the fields covered by that law'.²⁶⁸ The two referring courts were therefore unsurprisingly found to come under the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU. As such, the referring courts must meet the requirements of effective judicial protection, which includes an obligation for the Polish authorities to respect and maintain their independence.

Admissibility issues

This judgment is however particularly noteworthy insofar as admissibility issues are concerned. The main problem the referring courts faced concerned the absence of any obvious connecting factor between the disputes before them (which concerned matters relating to public expenditure and criminal law), and the provisions of EU law whose interpretation was sought. In other words, the referring courts were not able to convince the Court of Justice that

²⁶⁸ Joined Cases C-558/18 and C-563/18, EU:C:2020:234, para. 34.

the disputes before them were substantively connected to EU law, in particular to the second subparagraph of Article 19(1) TEU. The Court furthermore noted that the referring courts did not ask questions on the interpretation of procedural provisions of EU law which the referring courts would be required to apply in order to deliver their judgments. Lastly, the Court observed that any eventual answer to the questions asked would not ‘appear capable of providing the referring courts with an interpretation of EU law which would allow them to resolve procedural questions of national law before being able to rule on the substance of the disputes before them’.²⁶⁹ The two requests for a preliminary ruling were therefore declared inadmissible.

This is a complex area of EU law. As observed by Professor Platon and one of the present authors at the time of the *Portuguese Judges* ruling,

national measures which may undermine the independence of a court may also be challenged indirectly through a national litigation which is not connected with EU law. In such a case, a party could claim that, due to a national measure allegedly affecting the judiciary, the national court having jurisdiction is not independent. If such a matter were to be brought to the ECJ, what would it do? Would it require that the main case itself falls within the scope of EU law? Or would the Court accept its own jurisdiction as long as the national measure that is challenged incidentally is likely to affect the independence of a court which ‘may’ rule on EU law, even if the main case is not itself connected with EU law?²⁷⁰

The Court’s judgment in the present instance has at least clarified that if the dispute before the referring court does not fall within the scope of EU law, and in the absence of any apparent connecting factor between the second subparagraph of Article 19(1) TEU and the dispute, ‘the referring court must explain clearly in the order for reference how the interpretation of the Court as to whether a national measure affects the independence of national courts is relevant for the main case, and in particular how this interpretation may affect the outcome of the main case’.²⁷¹ In other words, the referring court must explain the extent to which a question relating to judicial independence is objectively relevant to solving the dispute at hand.

This is not an easy requirement to satisfy *unless* the parties themselves are challenging: (i) national measures which *directly* bring judicial independence matters to the fore and/or (ii) the independence of the referring court itself (or one or more of its judges) and/or (iii) the independence of other courts whose rulings may be of relevance to solving the dispute at hand, as the Court proved unwilling even to consider the activation of a preliminary disciplinary

²⁶⁹ *Ibid.*, para. 51.

²⁷⁰ Pech and Platon, *op. cit.*, at 1842.

²⁷¹ *Ibid.*, at 1842–1843.

investigation against the referring judges for a possible abuse of the Article 267 TFEU procedure as a connecting factor in this context. This suggests that the only possible avenue for judges who are subject to arbitrary disciplinary investigation and other measures amounting to intimidation and harassment would be to challenge these measures before the relevant national court. The national court could then be requested to refer the matter to the Court of Justice. This however may be criticised for imposing an ‘unnecessary detour upon affected judges’,²⁷² while also assuming there are independent courts left to hear the actions to begin with.

Abandoning referring judges to their fates?

Viewed in this light, the Court’s judgment may be understood as abandoning the referring judges to their fates, by deciding that ‘not every judge in every procedure is in the position to remedy potential violations of judicial independence with a reference to Luxembourg’.²⁷³ And this is indeed seemingly why this outcome in these two joined cases was vocally welcomed by Polish authorities, with the Polish Minister of Justice speaking for instance of ‘a very good decision’.²⁷⁴ However, this reaction seems to derive from only a cursory or possibly no reading at all of the Court’s judgment. Indeed, not only did the judgment confirm the Court’s jurisdiction to review Poland’s ruling coalition’s so-called ‘judicial reforms’, the judgment also contained the starkest warning to date regarding the obvious attempts by the Polish authorities to intimidate Polish judges so as to create a chilling effect which would dissuade any judge from sending any questions to Luxembourg.

The Court’s order of 12 February 2019 in *RH* is also worth noting in this respect. There the Court held that ‘not being exposed to disciplinary sanctions for exercising a choice, such as sending a request for a preliminary ruling to the Court or choosing to wait for the reply to such a request before adjudicating on the substance of a dispute before them, which is exclusively within their jurisdiction, constitutes a guarantee essential to judicial independence’.²⁷⁵ In this instance, a Bulgarian judge was under the threat of disciplinary proceedings for not complying with the mandatory instructions of a higher court in relation to a national law which obliged national courts – unlawfully, as the Court of Justice clarified – to adjudicate on the legality of a pre-trial detention decision without the opportunity to make a request for a preliminary ruling or even wait for the Court of Justice’s reply. Unsurprisingly, the Court of Justice found this Bulgarian legislation incompatible with Article 267 TFEU and Article 47 CFR.

²⁷² L.D. Spieker, ‘The Court gives with one hand and takes away with the other: The CJEU’s judgment in *Miasto Łowicz*’, *VerfBlog*, 26 March 2020: <<https://verfassungsblog.de/the-court-gives-with-one-hand-and-takes-away-with-the-other/>>

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ Case C-8/19 PPU, EU:C:2019:110, para. 47.

We should note in passing that it is surprising to say the least that this legislation was not subject to any infringement action by the Commission. After all, its own communication published in 2017 in which the Commission professed its intention to make strategic use of Article 258 TFEU, explicitly stated that the Commission would

give high priority to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework. This applies in particular to infringements which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law. The Commission will therefore pursue rigorously all cases of national rules or general practices which impede the procedure for preliminary rulings by the Court of Justice, or where national law prevents the national courts from acknowledging the primacy of EU law.²⁷⁶

As previously noted, the reality of the Commission's enforcement record is difficult to reconcile with the above statement, which has, for instance, resulted in less than one infringement action per year aiming at protecting judicial independence since the activation of the rule of law framework in January 2016 in relation to Poland, and none since the activation of Article 7(1) TEU in relation to Hungary. The notion of 'high priority' seems therefore to be differently understood by the Commission presided over by Ursula von der Leyen.²⁷⁷

Be that as it may, the two judges who submitted questions to the Court of Justice in the present two cases were themselves brought for questioning for 'a possible exceeding of jurisdiction' following their use of Article 267 TFEU.²⁷⁸ The Court here first took note that the investigation proceedings were 'closed on the ground that no disciplinary misconduct, involving a failure to respect the dignity of their office as a result of making those requests for a preliminary ruling, had been established'.²⁷⁹ The Court did not however stop there. On the contrary, the Court took full account of the chilling effect of these proceedings, whose mere initiation violated Article 267 TFEU. Indeed, the Court makes subsequently clear when it explicitly held – arguably the key aspect of its ruling – that EU law precludes any legislation, measures or actions 'which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling'.²⁸⁰ As if to avoid any doubt, the Court added

²⁷⁶ European Commission communication, EU law: Better results through better application, 2017/C 18/02, p. 14.

²⁷⁷ L. Pech, K.L. Scheppele, W. Sadurski, 'Before It's Too Late', *VerfBlog*, 28 September 2020: <<https://verfassungsblog.de/before-its-too-late/>>

²⁷⁸ L. Pech, P. Wachowicz, '1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)', *VerfBlog*, 17 January 2019: <<https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/>>

²⁷⁹ Joined Cases C-558/18 and C-563/18, op. cit., para. 54.

²⁸⁰ *Ibid.*, para. 58.

that ‘the mere prospect [...] of being the subject of disciplinary proceedings’ as a result of making or maintaining references for a preliminary request is not acceptable. Most recently and positively, in the *Romanian Judges* case, the Court explicitly relied on the concept of chilling effect to make clear that national authorities must provide guarantees designed to avoid any risk of external pressure on the content of judicial decisions when adopting new rules regarding the personal liability of judges.²⁸¹ Any national rule, mechanism or procedure which is used as (or may be converted into) an instrument of pressure on judicial activity is not compatible with Article 2 and the second subparagraph of Article 19(1) TEU.

The judgment’s main shortcomings

In our view, the main shortcoming of this judgment is that the Court failed to state explicitly that EU law covers and precludes disciplinary *investigations* of this kind so as to prevent the authoritarian tactic of leaving judges in limbo during investigation proceedings which are never formalised. On this point, the AG’s assessment was seriously flawed in suggesting that disciplinary investigations, because they had yet to take the form of formal disciplinary proceedings, meant that the ‘referring courts have merely a subjective fear which has not crystallised into disciplinary proceedings and remains hypothetical’.²⁸² It is indeed difficult to see how we could conclude that a judge being subject to a disciplinary summons for ‘a possible exceeding of jurisdiction’, before being deliberately left in limbo while being subject to Kafkaesque investigative activities, should be considered an experience of only ‘subjective fear’.

On this issue, both the AG and the Court may be criticised for failing to appreciate the reality of working as a judge in an authoritarian regime in the making, where sham disciplinary but also grotesque criminal charges have become routine. Sadly, in a more recent opinion, this time from AG Pikamäe in relation to Hungary, this absurd approach where referring judges can be arbitrarily subjected to disciplinary proceeding as long as they are ended prior to

²⁸¹ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația ‘Forumul Judecătorilor din România’ et al.*, EU:C:2021:393, para. 236.

²⁸² AG Opinion, para. 118. See also P. Marcisz, ‘Creating a Safe Venue of Judicial Review: AG Tanchev on the Admissibility of Preliminary References re Polish Disciplinary Proceedings’, *VerfBlog* 11 October 2019: <<https://verfassungsblog.de/creating-a-safe-venue-of-judicial-review/>> (‘it is rather rich to observe that any fears by the referring judges were hypothetical, only to notice a few lines below that indeed there were preliminary disciplinary proceedings launched against them after they made the preliminary references’).

the Court of Justice deciding the national request, continues to be espoused.²⁸³ The chilling effect of such proceedings is ignored, with mostly euphemistic language being used instead of more explicit and forceful criticism. One may however expect the Court to be more forceful and soon move away from this soft approach of tolerating disciplinary proceedings against referring judges as long as they are withdrawn during the course of a case. Indeed, this soft approach has only encouraged autocratic authorities to intimidate referring judges at an early stage in a more tactical manner with the view of dissuading most judges from using Article 267 TFEU at all when it comes to judicial independence issues.

To build on Petra Bárd's analysis, these patently abusive disciplinary investigations/proceedings come close to constituting the disciplinary equivalent for judges of the vexatious SLAPP (strategic litigation against public participation) suits used to bully critics into silence.²⁸⁴ It is to be hoped that the Court will therefore come down hard on these attempts to bully judges into not making use of Article 267 TFEU. In this respect, we can but only commend AG Tanchev's change of position within the framework of the currently pending third infringement action targeting Poland's new disciplinary regime of judges, which essentially adopts the framework of analysis advocated by one of the present authors:²⁸⁵

The examples invoked by the Commission attest to disciplinary proceedings or measures taken against judges on account of decisions they issued in connection with the changes to the Polish justice system and the independence of Polish

²⁸³ Opinion of AG Pikamäe delivered on 15 April 2021 in Case C-564/19, EU:C:2021:92, para. 97: 'In that respect, it should be noted that the main proceedings in the context of which the Court has been requested to provide a preliminary ruling do not concern the bringing of disciplinary proceedings against the referring judge, nor do they concern the status of the judiciary and provisions concerning the disciplinary regime for judges. Furthermore, it is common ground that the decision initiating the disciplinary proceedings was withdrawn and those proceedings terminated. In that context, the fifth question referred to the Court does not concern an interpretation of EU law which meets a need inherent in the determination of the main case, and an answer to that question would result in the Court delivering an advisory opinion on general or hypothetical questions, such as the possible psychological reaction of Hungarian judges to the disciplinary proceedings brought on the basis of the Kúria's judgment in terms of the future referral of questions for a preliminary ruling. The fifth question must therefore be declared inadmissible.' Were the Court to find the question admissible, the AG then suggests repeating the Court's warning in *Miasto Łowicz*, which we find however excessively 'diplomatic' considering the deliberate and increasingly frequent attempts to undermine the functioning of the preliminary ruling procedure via sham disciplinary proceedings.

²⁸⁴ P. Bárd, 'Jeopardizing Judicial Dialogue is Contrary to EU Law: The AG Opinion in the IS case', *VerfBlog*, 20 April 2021: <<https://verfassungsblog.de/jeopardizing-judicial-dialogue-is-contrary-to-eu-law>>

²⁸⁵ L. Pech, *The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU*, March 2021: <<https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect>>. See also L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1, 35–36 (the Court ought to 'make clear that disciplinary investigations also violate EU law when they aim to dissuade judges from applying EU law' as the Court's current position 'has led authoritarian-minded authorities to deliberately leave targeted judges in limbo by delaying the formal initiation of disciplinary proceedings').

judges. The fact that the investigations did not lead to disciplinary charges against the judges concerned or that the disciplinary officer's assessment is not binding on disciplinary courts *is irrelevant, as such measures are liable to exert pressure on judges* [our emphasis]. The mere possibility that disciplinary proceedings or measures could be taken against judges on account of the content of their judicial decisions undoubtedly creates a 'chilling effect' not only on those judges, but also on other judges in the future, which is incompatible with judicial independence.²⁸⁶

In light of this new, more forceful and entirely warranted approach, one expected the Court to adjust its previous stance in *Miasto Łowicz* which it did in its infringement judgment of 15 July 2021 in Case C-791/19 regarding Poland's new disciplinary regime for judges.²⁸⁷

Speaking of infringement action, there is another paragraph in *Miasto Łowicz* which is worth stressing. It may indeed be understood as a not so subliminal message to the Commission to do its duty as Guardian of the Treaties by more promptly initiating infringement proceedings, of adequate scope, so as to protect national judges from systemic attacks by those keen on annihilating judicial independence. This is indeed *the second time* after the *AK* ruling, where the Court has taken the time *explicitly* to stress how its task under Article 267 TFEU must be distinguished from its task under Article 258 TFEU. In the words of the Court,

Whereas, in an action for failure to fulfil obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the specific dispute pending before that court.

At the time of writing, it would appear that the Commission presided over by Ursula von der Leyen has yet to hear or understand this message.

²⁸⁶ Opinion of AG Tanchev delivered on 6 May 2021 in Case C-791/19, EU:C:2021:366, para. 84.

²⁸⁷ See *supra* 3.2.3.

5 The Court of Justice's recalibration of its case law beyond effective judicial protection

The rule of law crisis has had a significant albeit often implicit impact on the Court's case law with the Court arguably recalibrating its interpretation and approaches in relation to several fundamental concepts in EU law, primarily in light of the situation in Poland.

This impact can be first evidenced in the stricter interpretation of the meaning of 'court or tribunal' in the sense of Article 267 TFEU used in Case C-274/14 *Banco de Santander SA*. A similar tightening of the concept of 'issuing judicial authority' within the meaning of the European arrest warrant (EAW) can be detected in Joined Cases C-508/18 *OG (Public Prosecutor's Office of Lübeck)* and C-82/19 PPU *PI (Public Prosecutor's Office of Zwickau)*, as well as in Case C-509/18 *PF (Prosecutor General of Lithuania)*.

Yet another significant development, likely to have been brought about, at least in part, in reaction to Poland's rule of law breakdown, can be found in Case C-284/14 *Commission v. France*, where the Court offered a long-awaited recalibration of *CILFIT*. The Court also pushed for a stricter defence of the jurisdiction of the national courts to ensure full effectiveness of EU law in Case C-284/16 *Achmea*, a stricter defence which however threatens to leave investors formerly covered by intra-EU bilateral investment treaties (BITs) without any effective judicial protection in countries experiencing rule of law backsliding.

The Court of Justice also enabled, at least theoretically, the stricter scrutiny by judicial authorities called upon to execute EAWs of mutual trust obligations, on the basis of systemic deficiencies which may affect the independence of a national judiciary in a backsliding Member State in Case C-216/18 PPU *LM (Celmer)*. This recalibration may however be viewed as patently insufficient considering the systemic nature of Poland's rule of law breakdown.

Finally, the Court adopted a demanding interpretation of the term 'established by law' to comprehensively review an EU judicial appointment procedure in its Grand Chamber judgment of 26 March 2020 in *Simpson and HG*. While this judgment did not concern a national judicial appointment procedure, it was not too difficult to see how the Court's reasoning could be easily extrapolated to

the situation in Poland where manifest irregularities have repeatedly affected the appointments of multiple individuals in particular to the Supreme Court.

A mixed picture emerges through these developments. On the one hand, the principle of the rule of law in Europe is seemingly much reinforced and also boasts much better articulated components, including in particular the EU requirements relating to judicial independence as well as the autonomy and supremacy of EU law. On the other hand, overreliance on national courts in situations where their independence may come under systemic threat, combined with hesitance, on the part of the Court of Justice, to tolerate any dispute resolution not overseen from the Kirchberg plateau, may regrettably result in less effective judicial protection in practice.²⁸⁸ When one adds to this the Court's test in relation to EAWs issued from judicial authorities located in backsliding countries, which is virtually unworkable in practice for the judicial authorities called upon to execute these EAWs, the troubled reality shaped by some of the latest case law vividly comes to light.

Be that as it may, let us now examine each of the significant judgments issued by the Court of Justice since *Portuguese judges* which seek, explicitly or implicitly, to adjust traditional EU law concepts, principles or exceptions in the light of the rule of law crisis experienced first and foremost in Poland: (1) Case C-274/14 *Banco de Santander SA*, which offers a stricter interpretation of the idea of 'court or tribunal of a Member State' for the purposes of Article 267 TFEU; (2) Joined Cases C-508/18, *OG (Public Prosecutor's office of Lübeck)* C-82/19 PPU, *PI (Public Prosecutor's office of Zwickau)* and Case C-509/18, *PF (Prosecutor General of Lithuania)* which offer a stricter interpretation of the concept of 'issuing judicial authority' within the meaning of the EAW Framework Decision; (3) Case C-416/17, *Commission v. France*, which offers a stricter interpretation of the obligation to refer for courts of last resort under Article 267 TFEU; (4) Case C-284/16, *Achmea* which offers a stricter defence of the jurisdiction of national courts to ensure the full effectiveness of EU law; (5) Case C-216/18 PPU, *LM (Celmex)*, which provides a stricter defence, at least theoretically, of the right to an independent tribunal in a situation of systemic or general deficiencies regarding the rule of law via a new judicial test in relation to EAWs issued from authorities located in backsliding states; and finally (6), Joined Cases C-542/18 RX-II *Simpson* and C-543/18 RX-II *HG*, in which the Court adopted a stricter interpretation of the right to a tribunal established by law.

²⁸⁸ One of the present authors, writing with Professor Lavranos, has given clear examples from the Hungarian legal order of how this happens in practice: See D. Kochenov and N. Lavranos, 'Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' (2021) 13 *The Hague Journal of the Rule of Law* (early view): <<https://doi.org/10.1007/s40803-021-00153-7>>

5.1 Stricter interpretation of ‘court’ for the purposes of Article 267 TFEU: Case C-274/14 *Banco de Santander SA*²⁸⁹

In this case, the Court reversed its previous rather lax case law on the independence of the Spanish tax tribunals (TEAs), finding that they do not meet the requirements of independence. They cannot therefore submit questions to the Court of Justice under Article 267 TFEU as they are not ‘courts or tribunals’ within the meaning of EU law, an outcome which is undeniably the result of the Court’s stricter defence of the principle of judicial independence since its *Portuguese Judges* ruling. Furthermore, and most importantly, the Court underlined that even if a body is not sufficiently independent to refer preliminary questions, this fact does not in any way release it from a strict obligation to correctly apply EU law.

JUDGMENT OF THE COURT (Grand Chamber)

21 January 2020

In Case C-274/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain), made by decision of 2 April 2014, received at the Court on 5

June 2014, in the proceedings

Banco de Santander SA

[For ease of reading, references to previous cases have been omitted]

Excerpts:

59 The principle of irremovability, the cardinal importance of which is to be emphasised, requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed.

60 The guarantee of irremovability of the members of a court or tribunal thus requires that dismissals of members of that body should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal.

²⁸⁹ EU:C:2020:17.

[...]

66 Whilst, it is true, the applicable national legislation lays down rules governing, *inter alia*, abstention and recusal of the President and other members of the TEAC or, in the case of the President of the TEAC, rules on conflicts of interest, disqualification and duties of transparency, it is common ground that the arrangements for removal of the President and other members of the TEAC are not determined by specific rules, by means of express legislative provisions, such as those applicable to members of the judiciary. The members of the TEAC are covered solely, in that respect, by the general rules of administrative law and, in particular, by the basic regulations relating to civil servants, as the Spanish Government confirmed during the hearing before the Court. That finding also applies in relation to the members of the regional and local TEAs.

67 Consequently, the removal of the President and the other members of the TEAC and of the members of the other TEAs is not limited, as required by the principle of irremovability recalled in paragraph 59 of the present judgment, to certain exceptional cases reflecting legitimate and compelling grounds that warrant the adoption of such a measure, subject to the principle of proportionality and to the appropriate procedures being followed, such as cases of incapacity or of a serious breach of obligations rendering the individuals concerned unfit for the purposes of carrying out their duties.

68 It follows that the applicable national legislation does not ensure that the President and the other members of the TEAC are protected against direct or indirect external pressures that are liable to cast doubt on their independence.

[...]

72 As regards, secondly, the requirement of independence in its second, internal, aspect, [...] it must be noted that there is indeed a separation of functions within the Ministry of the Economy and Finance between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery of tax and, on the other hand, the TEAs which rule on complaints lodged against the decisions of those departments.

73 Nevertheless, as the Advocate General also noted in points 31 and 40 of his Opinion, certain characteristics of the extraordinary appeal procedure before the Sala Especial para la Unificación de Doctrina (Special Chamber for the Unification of Precedent, Spain), a procedure governed by Article 243 of the LGT, are such as to cast doubt on the fact that the TEAC acts as a 'third party' with respect to the interests before it.

74 Only the Director-General of Taxation of the Ministry of the Economy and Finance may lodge such an extraordinary appeal against decisions of the TEAC with which he or she disagrees. However, that Director-General will automatically be part of the eight-person panel that is to hear that appeal, along with the Director-General or the Director of the department of the State Tax Administration Agency to which the body that issued the act referred to in the decision that is the object of that extraordinary appeal belongs. Thus, both the Director-General of Taxation of the Ministry of the Economy and Finance, who lodged the extraordinary appeal against a decision of the TEAC, and the Director-General or the Director of the department of the State Tax Administration Agency which adopted the act referred to in that decision, will sit as part of the Special Chamber of the TEAC hearing that appeal. The roles of party to the extraordinary appeal procedure and that of member of the body that is to hear such an appeal are thus conflated.

[...]

76 Thus, those characteristics of the extraordinary appeal for the unification of precedent which may be brought against decisions of the TEAC demonstrate the organisational and functional links that exist between that body and the Ministry of the Economy and Finance, in particular the Director-General of Taxation of that ministry and the Director-General of the department which adopts the decisions contested before the TEAC. The existence of such links makes it impossible to regard the TEAC as a third party in relation to that administration.

77 Consequently, the TEAC does not satisfy the internal aspect of the requirement of independence that is characteristic of a court or tribunal.

78 It must be added that the fact that the TEAs do not constitute ‘courts or tribunals’ for the purposes of Article 267 TFEU does not relieve them of the obligation to ensure that EU law is applied when adopting their decisions and to disapply, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect, since these are obligations that fall on all competent national authorities, not only on judicial authorities.

Analysis

Banco de Santander SA is a reversal of the previous case law on the independence of special Spanish tax tribunals: the Court had until then considered such tribunals sufficiently independent to send preliminary references, confirming this as recently as in 2000.²⁹⁰ Crucially for our purposes, this reversal, which

²⁹⁰ Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others*, EU:C:2000:145.

produced a much stricter standard of independence for a court or tribunal in the context of the European judiciary in the sense of the second subparagraph of Article 19(1)TEU, has significantly broader implications, setting a new standard for all the bodies willing to make use of the preliminary ruling procedure.

The deficiencies of the Court's previous relatively lax approach to independence have long been understood and critically analysed by several scholars and Advocates General.²⁹¹ Indeed, the criterion of independence was such that even bodies not recognised as courts and inserted within the administrative structures of the Member States were found eligible to make preliminary references.²⁹² The reversal is thus neither entirely unexpected, nor unwarranted. We are witnessing instead a recalibration of the case law, which is fully in line with the previously not followed Opinions of AG Saggio and AG Ruiz Jarabo-Colomer in *Gabalfrisa and Others* and *De Coster*. The latter bemoaned the 'relaxation of the requirement of independence'²⁹³ – which has now been reversed, the criterion of independence tightened, and its significance restored.²⁹⁴

Tightening of the independence criterion post Portuguese Judges

Importantly, the reversal of earlier case law happened as a direct consequence of the Court's increased attention to the substantive elements of the requirement of the rule of law of Article 2 TEU directly implied in the second subparagraph of Article 19(1)TEU, as we have seen in *Portuguese Judges*.²⁹⁵ In doing so, the Court followed the reasoning of AG Hogan who emphasised the Court's development of 'an impressive line of case-law addressing the requirements of judicial independence since the Court first tackled in a judgment of 21 March 2000 the issue of whether Spanish special tax tribunals are sufficiently independent to qualify as a 'court or tribunal' in the sense of Article 267 TFEU.²⁹⁶

The Court is also explicit about the reinforced importance of the principle of the rule of law in the context of contemporary EU law. It made for instance a reference to the recent case law building on all the provisions listed by the AG, explaining that the reassessment of independence 'must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular,

²⁹¹ See e.g. M. Broberg, 'Preliminary References by Public Administrative Bodies' (2009) 15 *European Public Law* 221; T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 *Common Market Law Review* 30.

²⁹² Broberg, 'Preliminary References by Public Administrative Bodies', op. cit.

²⁹³ Opinion of AG Ruiz-Jarabo Colomer in Case C-17/00 *de Coster*, EU:2001:366, para. 26.

²⁹⁴ See L. Pech, 'Article 47(2)', in S. Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd ed. Oxford: Hart Publishing, forthcoming in 2021).

²⁹⁵ See *supra* Section 2.

²⁹⁶ Opinion of AG Hogan delivered on 1 October 2019, EU:C:2019:802, para. 5. In Joined Cases C-110/98 to C-147/98, *Gabalfrisa and Others*, EU:C:2000:145, the Court held that the Regional Tax Tribunal of Catalonia must be regarded as a court or tribunal within the meaning of what is now Article 267 TFEU.

the criterion of independence which any national body must meet in order to be categorised as a ‘court or tribunal’ for the purposes of Article 267 TFEU’.²⁹⁷ In other words, rather than adding a new criterion for a national body to meet in order to fall within the scope of Article 267 TFEU, on top of what has already been established case law since the very beginning of the EU legal order,²⁹⁸ the Court has instead tightened the idea of independence.

The Court agreed with the AG following extensive references to its most recent case law ‘concerning, in particular, the criterion of independence which any national body must meet in order to be categorised as a ‘court or tribunal’ for the purposes of Article 267 TFEU’.²⁹⁹ For the Court, ‘the removal of the President and the other members of the TEAC and of the members of the other TEAs is not limited, as required by the principle of irremovability [...] to certain exceptional cases reflecting legitimate and compelling ground.’³⁰⁰ Furthermore, ‘certain characteristics of the extraordinary appeal procedure before the Special Chamber for the Unification of Precedent in Spain’³⁰¹ were found equally troublesome by the Court. The TEAC was therefore held to be governed by rules not compatible with the principle of irremovability and due to the organisational and functional links that exist between that body and the Spanish Ministry of the Economy and Finance, it did not in addition satisfy the internal aspect of the requirement of independence that is characteristic of a court or tribunal. As astutely noted by R. García Antón,

Article 267 TFEU goes beyond a mere procedure to ask for clarifications on how to interpret EU law to directly embrace the core goal of protecting the fundamental rights granted by EU law to European citizens against national interferences [...] What is revolutionary and derived from the current threats to the rule of law in several Member States is that the national bodies requesting questions for preliminary rulings have to be independent from adverse national interferences to ensure the protection of rights granted by EU law to European citizens. The circle is now closed and completely aligned with the goal allocated to Article 267 TFEU.³⁰²

This tightening happened through the introduction of a requirement to reassess the independence of the referring body after revisiting the idea directly following *Portuguese Judges*, including the ‘external’ and the ‘internal’ aspects

²⁹⁷ Judgment in C-274/14, para. 55.

²⁹⁸ Case 61/65 *Vaassen-Göbbels*, EU:C:1966:39.

²⁹⁹ Judgment in C-274/14, para. 55.

³⁰⁰ *Ibid.*, para. 67.

³⁰¹ *Ibid.*, para. 73.

³⁰² R. García Antón, ‘Can the Spanish Central Tax Tribunal make a preliminary reference under Article 267 TFEU?’, *EU Law Live*, 22 January 2020: <<https://eulawlive.com/op-ed-can-the-spanish-central-tax-tribunal-make-a-preliminary-reference-under-article-267-tfeu-a-final-tribute-to-advocate-general-saggio-and-ruiz-jarabo-colomer/>>.

of independence, both of which must be considered.³⁰³ The special tax tribunal making a reference in *Banco de Santander SA* notably failed both prongs of this stricter test.

The external part of the test ensures that the referring body should not be subject to any hierarchical constraints in coming to its decision and should function wholly autonomously. A special emphasis is made on the requirement of irremovability of the judges, a criterion of independence mentioned in *Wilson* and further developed in *Commission v. Poland (Independence of the Supreme Court)*.³⁰⁴

The internal aspect of independence in the reading provided by the Court must ensure that the court or tribunal is a genuine ‘third party’ *vis-à-vis* the interests in dispute in front of it. Indeed, while the Court found the breach, the AG was more vocal in coming to the same conclusion: AG Hogan considered that it was clear from the legal framework of the Spanish body in question that its design and functioning was ‘contrary to the maxim *nemo iudex in causa sua* and, by definition, contrary to the fundamental principle laid down in Article 47(2) of the Charter requiring an independent and impartial tribunal’.³⁰⁵

Implicit warning to Poland’s ‘fake judges’?

Independence plays a fundamental role – as also explained by AG Stix-Hackl in *Wilson* and repeated by AG Hogan in *Banco de Santander SA* – in making the distinction between national courts and administrative authorities. It should be clarified that the inability to make a preliminary reference due to the lack of independence does not mean that the body in question becomes exempt from ensuring full effectiveness and timely application of EU law – including, crucially, the principle of supremacy of EU law and the possible disapplication of national norms in contradiction with it. The Court referred, *inter alia*, to *Costanzo*,³⁰⁶ making one last vital point which deserves to be underlined here: being an authority which does *not* meet the criteria of ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU does not mean that such an authority is not bound by the requirement of implementing EU law correctly and in full. This is no doubt an implicit warning addressed primarily to Polish authorities, the judicial bodies they have captured and the new allegedly judicial bodies they have set up these past few years.

³⁰³ See also Case C-503/15 *Margarit Panicello*, EU:C:2017:126, paras 37–38.

³⁰⁴ Case C-506/04 *Wilson*, EU:C:2006:587, para. 51; Case C-619/18 *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531.

³⁰⁵ AG Opinion in C-274/14, para. 31.

³⁰⁶ Case 103/88 *Costanzo*, EU:C:1989:256, paras 30–33.

Banco de Santander SA is a great reminder that some rulings not seemingly connected with the rule of law crisis may nevertheless be understood as not so subliminal warnings to the national authorities engaged or tempted to engage in rule of law backsliding. Be that as it may, the key message we should draw from this judgment is that judicial dialogue between the numerous elements of the complex and multi-layered system of the EU judiciary is impossible unless all the participating bodies are fully independent: that is, are genuine courts rather than bodies masquerading as courts. The evolutionary analyses of the case law available on this aspect – including the one recently authored by President Lenaerts – are undoubtedly convincing.³⁰⁷

Yet, one of the crucial implications of *Banco de Santander SA* in the context of a continuing and seriously deteriorating situation in EU countries such as Poland and Hungary is truly far-reaching and represents a difficult dilemma of vital importance: as fewer national courts qualify as ‘courts or tribunals’ within the meaning of Article 267 TFEU due to systemic attacks on judicial independence organised by national authorities and the appointment of ‘fake judges’ to gangrene them from within, the proper courts/chambers left standing, and which remain unafraid of making use of the preliminary ruling mechanism to safeguard their independence, might face mounting difficulties in meeting the more stringent independence test. Remaining independent in a system which, as a whole, has been compromised or is under enormous pressure is possible, but obviously extremely difficult. Without any doubt, plenty of individual judges will strive to safeguard judicial independence even in a situation where the national judiciary is being or has been compromised from a systemic point of view. The Court of Justice will be offered a first opportunity to tackle these difficult issues in pending case C-132/20, a national request for a preliminary ruling which originates from an individual who was appointed to Poland’s Supreme Court on the back of a procedure manifestly marred by grave irregularities.³⁰⁸

5.2 Stricter interpretation of the obligation to refer for national courts of last resort under Article 267 TFEU: Case C-416/17, *Commission v. France (Advance Payment)*³⁰⁹

In this infringement judgment informally known as *Advance Payment*, the Court of Justice held that a failure by a national court of last instance to refer a question of interpretation of EU law to the Court of Justice amounts to a violation of EU law, fully justifying the Commission’s infringement action brought on such a basis and thus significantly reinforcing the vertical dimension of the EU’s judiciary in the sense of Article 19 TEU. The case equally underlines, however, the extent to

³⁰⁷ K. Lenaerts, ‘Our Judicial Independence and the Quest for National, Supranational and Transnational Justice’, in G. Sevik et al. (eds), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Berlin: Springer, 2019), 155.

³⁰⁸ See *infra* Section 6 for further analysis.

³⁰⁹ EU:C:2018:811.

which the famed dialogue between the national judges and the Court of Justice is not a dialogue of equals.³¹⁰ A failure to engage in an interpretation dialogue with the Court of Justice, especially when done in bad faith, will no longer be tolerated. This judgment thus amounts in essence to a significant ‘redesign’ of the practice of the preliminary reference procedure which should reinforce the unity of European judiciary at the expense of the room for manoeuvre which the highest courts of the Member States have enjoyed so far.

Two fundamental considerations immediately need to be underlined. First, the vertical unity of the European judiciary that this judgment seems to be reaffirming is only a fiction in a situation where many of the highest courts of the Member States do not in fact use the preliminary ruling procedure at all. It remains to be seen how far the Court of Justice will be successful in narrowing down the *CILFIT* case law, which essentially allowed it to save face and avoid confronting the reality of non-referrals by explaining – in arguable deviation from the text of Article 267 TFEU – that such referrals by the highest courts were not always required.³¹¹

Secondly, once we turn to the particular context of rule of law backsliding, this judgment can be viewed as the latest episode in a saga which started with *Costa v. ENEL*, where the Italian government unsuccessfully tried to prevent the local judge from sending a reference to the Court of Justice and the Court found the position of the Italian authorities unsustainable.³¹²

Only the picture today is much more complex than what it was when supremacy of EU law was first set out, because the highest ‘courts’ in the backsliding Member States – some no longer courts *tout court* – besides not referring questions themselves, are increasingly complicit in the intimidation and unlawful tactics used to bully ordinary judges into not using the Article 267 TFEU procedure. In Hungary, *Kúria* – Orbán’s Supreme Court – can deem a reference to the Court of Justice sent from a lower Hungarian court unnecessary upon request of Orbán’s ‘Prosecutor General’, resulting in disciplinary proceedings against the judge if the reference is not recalled.³¹³ In Poland the situation is even more dramatic, with

³¹⁰ For further analysis, see M. Dawson, ‘Constitutional Dialogue between Courts and Legislatures in the European Union’ (2013) 19 *European Public Law* 369.

³¹¹ See most recently the Opinion of AG Bobek delivered on 13 April 2021 in Case C-561/19 *Consorzio Italian Management*, EU:C:2021:291 in which the AG recommends to the Court to revisit the CILFIT criteria with respect to the duty of national courts of last instance to request a preliminary ruling when three cumulative conditions are met: (i) a general issue of interpretation of EU law; (ii) to which there is objectively more than one reasonably possible interpretation; (iii) for which the answer cannot be inferred from the existing case-law of the Court.

³¹² See, for a detailed analysis, A. Arena, ‘From an Unpaid Electricity Bill to the Primacy of EU Law; Gian Galeazzo Stendardi and the Making of *Costa v. ENEL*’ (2019) 30 *European Journal of International Law* 1017.

³¹³ P. Bárd, ‘Jeopardizing Judicial Dialogue is Contrary to EU Law: The AG Opinion in the IS case’, *VerfBlog*, 20 April 2021: <<https://verfassungsblog.de/jeopardizing-judicial-dialogue-is-contrary-to-eu-law>>

an unconstitutional legislative prohibition on preliminary rulings which raise judicial independence questions and, most recently, criminal charges brought against critical judges with the aim of giving the ECJ-suspended 'Disciplinary Chamber' an opportunity to arbitrarily waive their judicial immunity *pour décourager les autres*.³¹⁴

As we have observed both in Hungary and in Poland, the fish of judicial independence, as always, rots from the head down. Defending a strict and enforceable obligation to refer to the highest courts could then, theoretically at least, help defend the rule of law indirectly. Viewed in this light, the Court of Justice's judgment in *Advance Payment* may be understood both as an implicit warning to the captured courts of last resort in backsliding countries, unsurprisingly unheeded to this date, not to interfere with the functioning of the preliminary ruling procedure, and an implicit invitation for the Commission, sadly so far unheeded, to more strictly enforce this obligation.

JUDGMENT OF THE COURT (Fifth Chamber)
4 October 2018
Case C-416/17
ACTION under Article 258 TFEU for failure to fulfil obligations
European Commission v. French Republic (Advance Payment)

[for ease of reading, references to previous cases have been omitted]

Excerpts:

106 [...] it should be noted, first, that the obligation of the Member States to comply with the provisions of the FEU Treaty is binding on all their authorities, including, for matters within their jurisdiction, the courts.

107 Thus, a Member State's failure to fulfil obligations may, in principle, be established under Article 258 TFEU whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.

108 Second, it must also be noted that, where there is no judicial remedy against the decision of a national court, that court is in principle obliged to make a reference to the Court within the meaning of the third paragraph of

³¹⁴ L. Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber"' (2021) 58 *Common Market Law Review* 137. See also the Court's order in C-204/21 R, EU:C:2021:593, para. 119 which mentions more than 40 requests to lift the immunity of ordinary but also Supreme Court judges, including the President of the Labour Chamber and three judges of the Criminal Chamber.

Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it.

109 Moreover, the obligation to make a reference laid down in that provision is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States.

[...]

113 Consequently, there is no need to examine the other arguments put forward by the Commission in the context of the present complaint and it must be held that it was for the Conseil d'État (Council of State), as a court or tribunal against whose decisions there is no judicial remedy under national law, to request a preliminary ruling from the Court of Justice on the basis of the third paragraph of Article 267 TFEU in order to avert the risk of an incorrect interpretation of EU law.

114 Consequently, since the Conseil d'État (Council of State) failed to make a reference to the Court, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, in order to determine whether it was necessary to refuse to take into account, for the purpose of calculating the reimbursement of the advance payment made by a resident company in respect of the distribution of dividends paid by a non-resident company via a non-resident subsidiary, the tax incurred by that second company on the profits underlying those dividends, even though its interpretation of the provisions of EU law in the judgments of 10 December 2012, *Rhodia*, and of 10 December 2012, *Accor*, was not so obvious as to leave no scope for doubt, the fourth complaint must be upheld.

Analysis

AG Wathelet rightly underlined the importance of this case by stressing in his Opinion that 'this is the first time that the Court has been called upon to rule on a complaint of this kind in the context of an action for the failure to fulfil obligations. However, the theoretical possibility of a State failing to fulfil its obligations on the basis of an infringement of the third paragraph of Article 267 TFEU appears to me to be certain'.³¹⁵ Indeed, this theoretical possibility had been abundantly discussed in EU law textbooks since the founding of what is now the EU. *Advance Payment* was arguably worth the wait. Indeed, and to follow Professor Sarmiento, the Court's judgment represents a ground-breaking development which represents 'a tremendous step forward in the

³¹⁵ Opinion delivered on 25 July 2018 in Case C-416/17, EU:C:2018:626, para. 87.

development of a coherent system of remedies’, which will help inter alia overcome arbitrary decisions of supreme courts.³¹⁶ This is therefore a particularly significant development which offers the Commission a clear new pathway to bring infringement actions, especially as regards captured supreme or constitutional courts. That said, we have known all along that breaches of the Treaties by independent authorities, including national courts, can obviously be the subject of infringement actions by the Commission but also the Member States themselves.³¹⁷ Moreover, and this point is equally underlined by AG Wathelet, we have known all along that the difficulty of remedying breaches by independent national institutions is not an argument that could convince the Court.³¹⁸ The Court has indeed already established – albeit clothing its reasoning in a very careful wording underlining the importance of the ongoing dialogue with the national-level judiciary – that infringement actions can be launched in respect of the rulings of national courts when these rulings themselves violate EU law.³¹⁹ The Court, however, until *Advance Payment*, had been very careful not to place the blame on national courts but on the legislator. Never before had the sole failure to refer *per se* triggered the launch of a successful Article 258 TFEU procedure by the Commission.

The vital importance for national courts against whose decisions no further appeal is possible to comply with their EU law obligation to make a reference had previously been perfectly explained by AG Bot, whose views were repeated by AG Wathelet:

non-compliance on the part of national courts and tribunals against whose decisions there is no judicial remedy under national law with their obligation to make a reference has the effect of depriving the Court of the fundamental task assigned to it by the first subparagraph of Article 19(1) TEU, namely to ensure that in the interpretation and application of the Treaties the law is observed.³²⁰

³¹⁶ D. Sarmiento, ‘Judicial Infringements at the Court of Justice’, *Despite Our Differences Blog*, 9 October 2018: <<https://despiteourdifferencesblog.wordpress.com/2018/10/09/judicial-infringements-at-the-court-of-justice-a-brief-comment-on-the-phenomenal-commission-france-c-416-17/>>.

³¹⁷ See e.g. Case 77/69 *Commission v. Belgium*, EU:C:1970:34. This essentially means that the Member States can also initiate Article 259 TFEU actions based on such breaches, even though there have regrettably been no examples to date: D. Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool’ (2015) 7 *The Hague Journal of the Rule of Law* 153.

³¹⁸ See e.g. Case C-154/08 *Commission v. Spain*, EU:C:2009:695 and the annotation by M. Lopez Escudero (2011) 48 *Common Market Law Review* 227.

³¹⁹ Case C-129/00 *Commission v. Italy*, EU:C:2003:656 and the annotation by L. Rossi and G. Di Federico (2005) 42 *Common Market Law Review* 829.

³²⁰ Opinion of AG Bot in Case C-160/14 *Ferreira da Silva e Brito and Others*, EU:C:2015:390, para. 102, cited in Opinion of AG Wathelet in Case C-416/17, EU:C:2018:626, para. 90.

The nature of the dialogue between national courts and the Court of Justice is not altered by this case but it is made more explicit. Indeed, as Gareth Davies rightly underlined, while Europe may be pluralist and its courts may have different opinions on the same matter, the supranational Court of Justice is where the decisions happen to be taken³²¹ – a possibly harsh but necessary reality which the Court has reiterated with authority in *Advance Payment*. The prior leeway – which essentially granted national courts a licence to do as they pleased and which initially seemed quite broad thanks to the *CILFIT* doctrine interpreted most permissively by the judiciaries of the Member States – has been narrowed down significantly. *Advance Payment* builds on *Ferreira da Silva* in this respect,³²² where the Court clarified that *acte clair* is not a *carte blanche*. Indeed, to follow Sarmiento's analysis, '*CILFIT* has fully sharpened its teeth and the Court is willing to bite with it'.³²³

Need to better prevent misbehaviour and bad faith refusals to refer

Advance Payment may therefore be understood as representing a radical yet logical and much needed development as it clearly empowers the Commission to go after misbehaving national courts of last instance. Potential complications arise no doubt, out of the fact that some of these institutions have actually ceased to be courts *sensu stricto*. A good example of such an unlawfully composed body of the last instance is the Poland's so-called 'Constitutional Tribunal' which *deliberately* refused to refer questions to the Court of Justice so that it could attempt to neutralize, if not de facto nullify, the Court of Justice's *AK* judgment in the name of upholding EU law.³²⁴ *Advance Payment* empowers and should be understood as a message of encouragement directed at the Commission regarding the highest, now captured, 'courts' of Poland and Hungary. The long-term implications for the balance of judicial power as well as the possible protection of EU law rights of the individual litigants and the uniform application of EU law could be significant: the Court of Justice may well end up becoming a *de facto* Court of appeal against any national judgment with EU implications where no reference has been made, subject only to the Commission's willingness to bring the matter to Court: the tables are about to be turned in the realm of judicial power in Europe.

³²¹ G. Davies, 'Constitutional Disagreement in Europe and the Search for Pluralism' (2010) *Eric Stein Working Paper* 1/2010.

³²² Case C-160/14 *Ferreira da Silva e Brito and Others*, EU:C:2015:390.

³²³ Sarmiento, 'Judicial Infringements at the Court of Justice', op. cit.

³²⁴ A. Bień-Kacała, 'Polexit is Coming or is it Already Here? Comments on the Judicial Independence Decisions of the Polish Constitutional Tribunal', *Int'l J. Const. L. Blog*, 28 April 2020: <<http://www.icconnectblog.com/2020/04/polexit-is-coming-or-is-it-already-here-comments-on-the-judicial-independence-decisions-of-the-polish-constitutional-tribunal>>

Interesting questions arise in relation to the eligibility of the ‘fake judges’ sitting on the captured courts in the backsliding Member States to refer questions to the Court of Justice, which opens additional possibilities for the Court to encourage the intensification of dialogues with the rest of the judiciary in those states, including on the issue of the safeguarding of those courts’ own independence, thus actively side-lining ‘fake benches’. Moreover, such active side-lining of bodies masquerading as courts has the potential to be turned into a binding constitutional requirement following *Advance Payment*, including the potential active enforcement by the European Commission of any failure to refer preliminary questions to the Court. In doing so, the Commission would also offer the Court of Justice the opportunity to decide whether courts of last resort located in backsliding countries actually still deserve to be called courts, considering their lack of independence and/or their unlawful composition.

The Commission’s abysmal infringement record to date in relation to backsliding countries however suggests that the Guardian of the Treaties did not get the Court’s message in *Advance Payment*. Instead, the Commission seems deliberately more interested in writing reports about threats and violations of the Treaties than actually guarding the Treaties against these threats and violations. Examples of the Commission’s failure to guard the Treaties are numerous: from its framing of the regular rule of law reporting on the basis of the assumption that Poland and Hungary do not need to be singled out as special cases,³²⁵ to the lowered intensity of Article 258 TFEU actions, combined with the willingness to tolerate the most egregious violations of EU law by allegedly suspended bodies such as Poland’s Disciplinary Chamber, or Poland’s unlawfully composed ‘Constitutional Tribunal’,³²⁶ Most recently, with increasing threats of *imprisonment* levelled against *dozens of them* for the ‘crime’ of upholding the rule of law and applying EU law, Polish judges have ‘begged’ the Commission to act and yet what we continue to see is many more reports than legal actions and financial situations as the situation warrants.³²⁷ As the saying goes, you can lead a horse to water but you cannot make it drink. Similarly, there is only so much the Court of Justice can say or can do to get the Commission to fulfil its Treaty obligations and use its enforcement powers.

³²⁵ See D. Kochenov, ‘Elephants in the Room: The European Commission’s 2019 Communication on the Rule of Law’ (2019) 11 *Hague Journal on the Rule of Law* 423; B. Grabowska-Moroz and D. Kochenov, ‘EU Rule of Law: The State of Play Following the Debate Surrounding the 2019 Commission’s Communication’, in G. Amato and B. Barbisan (eds), *Rule of Law vs Majoritarian Democracy* (Oxford: Hart Publishing, 2021).

³²⁶ See L. Pech, P. Wachowiec and D. Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ (2021) 13 *Hague Journal on the Rule of Law* 1.

³²⁷ ‘Counsels of vocal judges urge EU official to take further actions to defend the rule of law’, *Rule of Law in Poland*, 10 May 2021, <<https://ruleoflaw.pl/counsels-of-vocal-judges-urge-eu-official-to-take-further-actions-to-defend-the-rule-of-law/>>

A crucial upgrade of the EU's system of remedies

The previous doctrine the Court tried to deploy to ensure full respect of Article 267(3) TFEU was *Köbler*,³²⁸ but starting a new procedure before the national courts for a failure to refer is quite cumbersome and not truly effective, as the story of Professor Köbler himself clearly demonstrates. Furthermore, *Köbler* offers no effective avenue in a situation where a national judiciary has been hijacked and the rule of law has been systematically undermined – precisely the situation when the effective and prompt enforcement of EU law becomes all but impossible.³²⁹ Relying on the Commission's direct actions emerges as a viable – and unique alternative in such a context. In this respect, *Advance Payment* provides a crucial upgrade of the EU's system of remedies, presuming that the Commission is willing and capable to act, which also requires EU national governments to put their money where their mouth is by providing the Commission with the staff it needs to handle the number of enforcement actions the current process of rule of law backsliding demands. Be that as it may, one may note that the Court of Justice dismissed the French government's vision of the procedural rights of the parties before national courts against whose decisions no further national appeal is possible and who fail to respect EU law fully. The government's position was that it is not for the parties to decide whether a reference should be made. And while this is unquestionably correct, *Advance Payment* protects the parties in the cases where EU law is disregarded by making clear that the Commission may launch infringement actions in such situations. As astutely observed by Professor Sarmiento, 'we are on the road towards a system in which national judicial decisions can be subject to review, in a direct and transparent way, by the Court'.³³⁰

The Court's reasoning in *Commission v. France* is moreover in line with the requirements of Article 6(1) ECHR flowing from the jurisprudence of the Strasbourg Court, which requires EU Member State courts against whose decisions no further national appeal is possible to give clear reasons for non-referral to the Luxembourg Court when questions of EU law arise. Ironically, the Strasbourg case law has been criticised, unconvincingly in our view, as an 'interference' in the dialogue between the national judges and the Luxembourg Court, while admitting that this 'interference' increases the level of judicial

³²⁸ Case C-224/01 *Köbler*, EU:C:2003:513 and for further analysis, see P. Wattel, 'Köbler, CILFIT and Weltgrove: We Can't Go on Meeting Like This' (2004) 41 *Common Market Law Review* 177.

³²⁹ D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed' (2013) XXXIII *Polish Yearbook of International Law* 145.

³³⁰ Sarmiento, 'Judicial Infringements at the Court of Justice', op. cit.

protection in the European legal space.³³¹ In any event, the case law as it stands today does not allow EU national courts of last resort to fail to explain why no reference to the Court of Justice has been sought if this issue has been raised.³³²

All in all, as Araceli Turmo rightly emphasised, *Advance Payment* reinforces the idea of a dialogue between the Court of Justice and the national judiciaries. Yet, it is not a *Köbler*-style dialogue, where the partners at least pretend to be equal. This is however the crude reality of the uncompromising obligation to refer laid down in Article 267(3) TFEU: ‘a dialogue, yes, but between unequal partners, when matters of EU law interpretation are concerned’.³³³ The shift in the ideas underpinning the reading of a non-referral under Article 267(3) TFEU in the eyes of EU law seems to be clear in this regard. As observed by Araceli Turmo:

However, one important statement does indicate a shift in thinking. In *Köbler*, the fact that the appropriate interpretation of Union law remained unclear seemed to constitute a mitigating factor in evaluating the gravity of the violation of substantive law, although a violation of Article 267(3) had been established. Here, the very fact that there were doubts and the Conseil did not refer a second question was enough to constitute an infringement under Article 258 TFEU.³³⁴

To conclude, while *Advance Payment* offers a significantly improved approach to rethinking the effectiveness of the preliminary ruling procedure when compared with the earlier *Köbler* take on the same problem, the effectiveness of this new approach as regards national judiciaries in backsliding Member States remains entirely dependent on the Guardian of the Treaties doing its job promptly and implacably, rather than seeking refuge in annual reports. Until the Commission stops considering enforcement as a last resort solution in this context, the promises of *Advance Payment* will continue to remain unfulfilled.

³³¹ C. Lacchi, ‘The ECtHR’s Interference in the Dialogue between National Courts and the Court of Justice of the EU: Implications for the Preliminary Reference Procedure’ (2015) 8 *Review of European Administrative Law* 95. For a criticism of the Strasbourg Court case law on the ground that it would lack predictability and consistency, see J. Kromendijk, ‘Tell me More, Tell me More: The Obligation for National Courts to Reason Their Refusals to Refer to the CJEU in *Sanofi Pasteur*’, *Strasbourg Observers*, 20 February 2020: <<https://strasbourgobservers.com/2020/02/20/tell-me-more-tell-me-more-the-obligation-for-national-courts-to-reason-their-refusals-to-refer-to-the-cjeu-in-sanofi-pasteur>>

³³² *Sanofi Pasteur v. France*, App. no. 25137/16, 13 February 2020; *Ullens de Schooten and Rezabek v. Belgium*, Apps nos 3989/07 and 38353/07, 20 September 2011. For further analysis, see J. Kromendijk, ‘“Open Sesame!”: Improving Access to the ECJ by Obliging National Courts to Reason Their Refusals to Refer’ (2017) 42 *European Law Review* 46.

³³³ A. Turmo, ‘A Dialogue of Unequals – The European Court of Justice Reasserts National Courts’ Obligations under Article 267(3) TFEU’ (2019) 15 *European Constitutional Law Review* 340, 341.

³³⁴ *Ibid.*, at 351–352 (footnotes omitted).

5.3 Stricter defence of the jurisdiction of national courts to ensure the full effectiveness of EU law: Case C-284/16 *Achmea*³³⁵

In *Achmea* the Court of Justice *de facto* outlawed intra-EU bilateral investment treaties (BITs) and the arbitration tribunals they had established. The agreement for the termination of BITs, which the absolute majority of the Member States had joined, followed in 2020.³³⁶ These developments are undoubtedly part of a general push by the Court of Justice to unify the vertical organisation of the EU judiciary.³³⁷ As a result of the successful attempts to abolish any alternative to the (unlawfully composed) national courts the Court of Justice, instead of consolidating its power, is putting all the eggs in one basket.³³⁸ It draws heavily on Opinion 2/13 and strives, rhetorically, to defend the unity of EU law and the jurisdiction of the courts meeting the conditions of Article 267 TFEU. This all sounds positive and commendable in theory, as the Union is acquiring a more centralised judiciary squarely bound by the principles and values of Article 2 and 19 TEU, thus supposedly increasing the level of judicial protection in the Union. In practice, however, *Achmea* does not sufficiently take into account two things. Firstly, the reality of rule of law backsliding as it has materialised in several Member States. On this count it appears to be a move in the opposite direction compared with the case law discussed above. Secondly, it is the potential of the BITs to ensure additional safeguards of rights as AG Wathelet explained in his Opinion in the case, which we discuss in detail below.

While arguably laudably motivated by an underlying aim to give a stronger voice to the Member States courts, *Achmea* does so however precisely at the moment where those courts might be becoming incapable of delivering justice or sanctioning violations of EU law. Consequently, while striving to build a better EU judiciary, *Achmea* may be viewed as achieving the opposite: it reduces the prior level of protection of rights without solving any outstanding problems. By pushing foreign investors to use the local court system in what may be a captured (illiberal) Member State where the output of the judicial system can be interfered with at will, the Court may have mistakenly undermined the rule of law and judicial protection in Europe.

³³⁵ EU:C:2018:158.

³³⁶ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169/1. E. Stoppioni, 'Disentangling Clashes of Paradigms: Member States Reinstate EU Law Philosophy Terminating BITs in the Internal Market', *EU Law Live*, 7 May 2020: <<https://eulawlive.com/op-ed-disentangling-clashes-of-paradigms-member-states-reinstate-eu-law-philosophy-terminating-isds-in-the-internal-market-by-edoardo-stoppioni>>

³³⁷ W. Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' (2018) 55 *Common Market Law Review* 1025.

³³⁸ *Ibid.*; D. Kochenov and N. Lavranos, '*Achmea* versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union' (2021) 13 *The Hague Journal of the Rule of Law* (Online first).

As the saying goes, the best is sometimes the enemy of the good. Autocrats have already started exploiting this, with evidence of arbitrary expropriations of EU investments slowly emerging.³³⁹ In Orbán's Hungary for instance, we have seen on a number of occasions *Achmea* being used as an argument to dismiss the jurisdiction of the tribunals protecting investors against unlawful expropriations.³⁴⁰ The arbitral tribunals, not bound by the Court of Justice's view of their own jurisdiction, have however refused to let autocrats have the upper hand.³⁴¹ In agreement with Wojciech Sadowski, it is submitted that 'investment treaty arbitration is not a real threat to the integrity of the European Union and the autonomy of EU law. Non-democratic governments in Warsaw and Budapest and their assaults on national judicial systems are'.³⁴² The case is thus a significant example of trying to achieve the right thing at wrong time, without full consideration of the judicial reality in backsliding countries.

JUDGMENT OF THE COURT (Grand Chamber)
6 March 2018
Case C-284/16,
REQUEST for a preliminary ruling under Article 267 TFEU from the
Bundesgerichtshof (Federal Court of Justice, Germany)
Slowakische Republik (Slovak Republic) v. Achmea BV

[for ease of reading, the references to previous cases have been omitted]

Excerpts:

32 In order to answer those questions, it should be recalled that, according to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.

³³⁹ Kochenov and Lavranos, op. cit.

³⁴⁰ See e.g. *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, (ICSID Case No. ARB/17/27), Award 13 November 2019: <https://www.italaw.com/sites/default/files/case-documents/italaw10914.pdf>; *UP and C.D Holding Internationale v. Hungary*, (ICSID Case No. ARB/13/35), Award, 9 October 2018: <<https://www.italaw.com/sites/default/files/case-documents/italaw10075.pdf>>.

³⁴¹ For further analysis, see Kochenov and Lavranos, op. cit.

³⁴² W. Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?' (2018) 55 *Common Market Law Review* 1025, at 1058.

33 Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other.

34 EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason *inter alia* of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU.

35 In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

36 In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law.

37 In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.

[...]

42 It follows that on that twofold basis the arbitral tribunal referred to in Article 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.

43 It must therefore be ascertained, secondly, whether an arbitral tribunal such as that referred to in Article 8 of the BIT is situated within the judicial system of the EU, and in particular whether it can be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. The consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU.

[...]

45 In the case in the main proceedings, the arbitral tribunal is not part of the judicial system of the Netherlands or Slovakia. Indeed, it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT.

46 That characteristic of the arbitral tribunal at issue in the main proceedings means that it cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU.

[...]

50 In those circumstances, it remains to be ascertained, thirdly, whether an arbitral award made by such a tribunal is, in accordance with Article 19 TEU in particular, subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court by means of a reference for a preliminary ruling.

[...]

56 Consequently, having regard to all the characteristics of the arbitral tribunal mentioned in Article 8 of the BIT and set out in paragraphs 39 to 55 above, it must be considered that, by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.

[...]

58 In the present case, however, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation referred to in paragraph 34 above.

Analysis

Achmea is an attempt to do the right thing and may be understood as another chapter in the Court's ongoing attempt to better protect the rule of law and the EU's system of remedies so as to guarantee a properly functioning European legal order which effectively protects the values, principles and rights laid down in the Treaties. Consequently, the Court ruled that Article 19(1) TEU and Articles 344 and 267 TFEU preclude reciprocal investment protection via the arbitral tribunals established under the BIT concluded between the Netherlands and the Slovak Republic. Member States and investors have therefore no choice but to rely on the domestic courts of the Member States instead.³⁴³ For the Court, the autonomy of EU law is undermined when there is the slightest risk of any court or tribunal not falling within the scope of Article 19(1) TEU applying EU law – consider the Spanish tax tribunals in *Banco de Santander SA*.³⁴⁴ Moreover, the very existence of any alternatives to national courts falling 'within the judicial system of the EU',³⁴⁵ is viewed by the Court of Justice as potentially undermining mutual trust between the Member States.

Defending the role of national courts while ignoring the reality of rule of law backsliding

This context is clear-cut and convincing, but the implications the Court draws from it are less so. In fact, the case could have a negative effect on the level of judicial protection in Europe, especially the protection of the rights of investors which used to be covered by intra-EU bilateral investment treaties (BITs) between the Member States, as well as the implications for the successful

³⁴³ M. Fanou, 'Intra-European Union Investor–State Arbitration Post-*Achmea*: RIP?' (2019) 26 *Maastricht Journal of European and Comparative Law* 316, at 322 et seq.

³⁴⁴ M. Andenas and C. Contartese, 'EU Autonomy and Investor-State Dispute Settlement under *inter se* Agreements between EU Member States: *Achmea*' (2019) 56 *Common Market Law Review* 157, at 170.

³⁴⁵ *Ibid.*, 174.

operation of the internal market.³⁴⁶ The reasons essentially come down to one only: the Court decided to give strong preference to the forceful proclamation of mutual trust while displaying distrust towards international law rights guarantees and ignoring the procedural and substantive problems investors will face in backsliding, not to say autocratising, countries such as Poland and Hungary. In other words, *Achmea* would probably hold (although not quite, as we show below) in a world where the judiciaries of all the Member States are fully independent and provide effective judicial protection, but this is absolutely not the reality observable in the EU today. Our analysis should not, however, be perceived as potential advocacy for a principle of ‘mistrust’ in EU law. This is, of course, not the case but as the facts in *Achmea* make clear, BIT tribunals are not incompatible with EU law. One may refer in this respect to the analysis of AG Wathelet. In addition, one must stress that the rights that the BITs protect are *not* flowing from / do not find direct expression in the EU Treaties. In other words, while the attack on BITs was absolutely unnecessary from the point of view of the uniform application of EU law, it predictably resulted not only in the complete disapplication of the said law where it was previously protected, but also in a situation of dubious legality, given that the ECJ’s Opinion about the BITs obviously does not bind the BIT Tribunals, as follows from their consistent practice, while making the protection of rights in the EU more difficult.

The fact remains that not only EU law fails to protect the rights guaranteed for investors under the BITs, which the EU itself forced on the Central and Eastern European countries in the context of the pre-accession, but also that the judiciary in the EU as a whole fails to ensure effective judicial protection as such. *Achmea* ignored both crucial aspects of EU legal reality and resulted in a situation where BIT tribunals ended up sidelined by the Court of Justice in the name of protecting the integrity of the vertically integrated independent EU judiciary, which, however, does not exist in all places, besides, materially, unable to protect the rights guaranteed under the BITs. If anything, the situation is worse than ever in the history of the EU, with the EU now including, for the first time, a country which is no longer a democracy (i.e. Hungary), while a second one (i.e. Poland) has organised its *de facto* exit from the EU legal order as far as EU rule of law requirements are concerned. Worse still, EU law does not necessarily protect all the rights offered in BITs,³⁴⁷ as the arbitration tribunal

³⁴⁶ In addition to Sadowski, *op. cit.*, see also C.I. Nagy, ‘Intra-EU Bilateral Investment Treaties and EU Law after *Achmea*: “Know Well What Leads You Forward and What Holds You Back”’ (2018) 19 *German Law Journal* 981; S. Gáspár-Szilágyi, ‘It Is Not Just about Investor-State Arbitration: A Look at Case C-284/16, *Achmea BV*’ (2018) 3(1) *European Papers* 357.

³⁴⁷ Nagy, *ibid.*, at 984.

had no difficulty to establish in *Achmea*.³⁴⁸ This means that even if Polish and Hungarian courts were fully independent and effective, *Achmea* would still mean a decrease in the level of rights protection. Add to this the internal market angle, where it is generally agreed that the BITs do matter when investment decisions are taken,³⁴⁹ and the negative impact of *Achmea* would seem difficult to deny.

In a context of the serious and apparently spreading rule of law backsliding, the Court could be expected to do a better job when it comes to re-establishing the principle of mutual trust. It may seem unwise in such a context to disregard the additional layer of protection which could come from *other* legal orders, even if not integrated through Article 19(1) TEU, given the annihilation of judicial independence and the complete dismantling of all checks and balances we are witnessing in Poland and Hungary respectively. The very essence of the principle of autonomy of EU law seems to be approached by the Court in *Achmea* through the lens of EU law's deeply antagonistic relationship with other legal orders – as we have already seen in Opinion 2/13.³⁵⁰ As pointed out by Panos Koutrakos:

The judgment in *Achmea*, therefore, put forward a richer and broader concept of autonomy than the previous case-law had suggested. Viewed from this angle, autonomy becomes, in essence, about conflict. The main features of the principle as they emerge in the judgment (the low threshold of tolerance for arbitration tribunals dealing with EU law issues, the broad language of the judgment, the purported need of domestic courts to have their EU law role protected in any theoretical set of circumstances) enable the Court to construe the relationship between EU law and international investment law as an antagonistic one.³⁵¹

It is quite clear that countless other, more fruitful and mutually enriching modes of engagement were possible, as was underlined in the academic literature and AG Wathelet's Opinion in this case.³⁵² Mutual engagement and cooperation between the legal orders in the face of rule of law backsliding could be a particularly fruitful way forward. Moreover, in dismissing the alternatives, a 'detailed analysis

³⁴⁸ *Achmea BV v. Slovak Republic*, UNCITRAL, PCA Case NO. 2008-13 (formerly *Eureco B.V. v. Slovak Republic*), Award of Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 262: "Thus EU law does not provide substantive rights for investors that extend as far as those provided by the BIT. There are rights that may be asserted under the BIT that are not secured by EU law."

³⁴⁹ C. Brower, S. Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: "Why It Should Not, and Must Not, Be Repossessed by States"' (2014) 52 *Columbia Journal of Transnational Law* 704.

³⁵⁰ D. Kochenov, *De Facto Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times*' (2021) XL *Polish Yearbook of International Law* 197.

³⁵¹ P. Koutrakos, 'The Autonomy of EU Law and International Investment Arbitration' (2019) *Nordic Journal of International Law* 41, at 56.

³⁵² See e.g. E. Sipiorski, 'Conflicting Conceptions of Constitutionalism: Investment Protection from the European Union and International Perspectives' (2019) 66 *Netherlands International Law Review* 219.

– comparable to the one in Opinion 2/13 – of how the [tribunal] meets [the outlined] conditions is lacking³⁵³. In essence, the Court, having engaged with none of the arguments to be found in the outstanding Opinion of AG Wathelet, proceeded to deploy procedural considerations related to the nature of the EU legal order as reformulated in Opinion 2/13 and, importantly, *Portuguese Judges*, in order to outlaw BITs between the Member States.

Using a sledgehammer to crack a nut

While the official reason behind *Achmea* is to protect the Member States' courts acting in their EU capacity and the proper functioning of EU law, including the principle of mutual trust, which – as the Court outlines in its judgment – are both called into question by intra-EU BITs, the actual results achieved are radically different at least at two levels. Moreover, they were also entirely unnecessary for the goals that the ECJ seemingly sought to achieve in *Achmea*. Indeed, investors have been successful in only ten cases over several decades out of 62 brought based on intra-EU BITs by the moment *Achmea* was heard.³⁵⁴ To put it differently, *Achmea* is like using a sledgehammer to crack a nut, in this instance, a meagre total of ten cases of potential fragmentation of EU law. Meanwhile, the Commission has yet to launch an infringement action directly targeting the hundreds of Polish 'judges' appointed or promoted on the basis of manifestly tainted procedures involving an unconstitutional body lacking any independence, with the result that thousands of judgments may well have been issued by 'courts' which lack the required independence and may well indeed not even be considered to be 'established by law'.³⁵⁵

At the most practical level, there is already a handful examples of cases where the arbitrators hearing cases based on intra-EU BITs have refused to accept *Achmea*-based objections brought by respondent states. This is an outcome that the Court of Justice could very well have predicted given that the arbitrators are not at all bound by its idea of the scope of EU law and conflict of laws rules,³⁵⁶ let alone the fact that EU law is immune to the protection of the many substantive investor rights guaranteed by BITs – precisely the rights the investment tribunals

³⁵³ Gáspár-Szilágyi, op. cit., at 363.

³⁵⁴ Opinion of AG Wathelet, EU:C:2017:699, para. 44: 'The systemic risk which, according to the Commission, intra-EU BITs represent to the uniformity and effectiveness of EU law is greatly exaggerated'. See contra M. Szpunar, 'Is the Court of Justice Afraid of International Jurisdictions?' (2017) XXXVII *Polish Yearbook of International Law* 125.

³⁵⁵ For further analysis, see *infra* Section 6.

³⁵⁶ I. Damjanović and O. Quirico, 'Intra-EU Investment Dispute Settlement under the Energy Charter Treaty in Light of *Achmea* and *Vattenfall*: A Matter of Priority', (2019) 26 *Columbia Journal of European Law* 102, at 123, 124 and 128, 129; S.V. Đajić, 'The *Achmea* Cases – Story on Treaty Interpretation, Forum Competition and International Law Fragmentation' (2018) 52 *Zbornik radova* 491.

are convened to protect and uphold.³⁵⁷ Problems can arise, of course, at the level of enforcement, especially given the stance the Commission takes on this count, as in *Micula*, where the treatment of the enforcement of the award as state aid by the Commission put the losing Member State in a difficult position, only to see the same enforcement proceedings pop up in the US.³⁵⁸ More of this type of proceedings are likely to occur closer to home after Brexit. As long as the sunset clauses of the terminated BITs are in operation, *Achmea's* success in achieving its stated goals is not obvious.³⁵⁹

Achmea's 'dark side'

The result of the Court's attempts to create an integrated EU judiciary under the guiding star of Article 19 TEU may therefore be viewed as counterproductive: *Achmea* enforces the proclamation of trust and does nothing to help achieve high levels of protection across the Member States to ensure that the thinking underpinning the trust proclaimed actually reflects the reality on the ground. It could thus help autocrats by supplying yet another rhetorical pirouette for the justification of rule of law backsliding: Polish and Hungarian governments always list *Achmea* when appearing before arbitral tribunals in an attempt to dismiss the actions brought against their rule of law violations in the absence of EU law to guarantee a comparable level of protection.³⁶⁰ Given that the BITs are precisely designed to offer protection in the new Member States of Central and Eastern Europe, this amounts to buying the autocrats more time to rig their justice systems even more to their advantage without any pressure the other way, be it costs in terms of money, or costs in terms of prestige from losing cases before the investment arbitration tribunals. *Achmea* therefore has a 'dark side' to the extent that it can help undermine the level of the rule of law protection in the EU, thus indirectly breaking the promise of Article 2 TEU without, as AG Wathelet compellingly showed, any need for doing so. The Court does this with reference to Article 2 TEU and Article 19(1) TEU, which however aim to protect rather than undermine the rule of law.

The Court of Justice's sweeping statement that the very conclusion of BITs somehow undermines mutual trust would appear to condemn *any* alternative dispute resolution systems bypassing the Courts in the sense of Article 19(1) TEU.³⁶¹ This happens of course in a situation where Article 7(1) TEU has been activated against not one but two Member States, for *inter alia* seriously and proactively undermining the independence of their judiciaries. Let us recall here

³⁵⁷ A. Uzelac, 'Why Europe Should Reconsider Its Anti-Arbitration Policy in Investment Disputes' (2019) *Access to Justice in Eastern Europe* 6, at 14–16; Nagy, *op. cit.*; Damjanović and Quirico, *op. cit.*, at 136–154.

³⁵⁸ For the whole story, see Nagy, *op. cit.*, note 14, at 985; Đajić, *op. cit.*, at 504 and 505.

³⁵⁹ Nagy, *op. cit.*

³⁶⁰ Kochenov and Lavranos, *op. cit.*, including the two detailed case-studies the authors provide.

³⁶¹ Fanou, *op. cit.*, at 329.

that if BITs do not rely on trust, this is precisely why the European Commission *required* that they be concluded by all the new Member States-to-be prior to the EU's enlargement as a condition of accession. Considering these developments, it seems that the very idea of 'mutual trust' has dramatically altered over the course of the last decade: from a substantive principle, it has become a procedural point, thus demonstrating a line of development *opposite* to the evolution of the principle of judicial independence over the same period. This problematic issue will be further analysed when reviewing the Court's judgment in *LM (Celmer)*.

As clearly emerges from the above, *Achmea* ironically imported the 'Copenhagen dilemma' (i.e. the EU's inability to protect fundamental rights in the sphere of national competence of the Member States after their accession to the EU³⁶²) into the sphere of rights' protection, which was not suffering from it, since all the BITs concluded as part of the pre-accession exercise remained in force and operated precisely to protect the rights of investors *after* the accession of Central and Eastern European Member States to the European Union. The Treaties of Accession, silent on the matter, made it clear – as AG Wathelet rightly underlined in his Opinion in *Achmea* – that the BITs were not concluded for the pre-accession period alone, which was the unconvincing argument the Commission made: not a single clause in the Accession Treaty packages demanded the BITs' renunciation.³⁶³ Indeed, the goal of the BITs was to promote the rule of law in the region by making sure that the deficiencies of the local justice systems would not impair investments in the enlarged internal market made both before *and* after their accession, thus compensating for the EU's potential post-accession inability to intervene, which is tackled on the EU side only now, almost 20 years after accession.³⁶⁴ *Achmea*, which targets such protections came about precisely when the deficiencies in the context of judicial independence and the rule of law in some of the new Member States became crystal clear.

Worse still, it directly builds on *Portuguese Judges*, the case which allowed the Court to start pushing back against such deficiencies which are poisoning EU values, with the sole difference that in *Achmea*, the Court uses *Portuguese Judges* to the opposite effect: in the fight for the rule of law, the Court of Justice does not need international allies. This De Wittian selfishness of the Court thus trumps

³⁶² For more on this issue and the Court's attempts to solve the dilemma, see, e.g. M. Leloup, D. Kochenov and A. Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*' (2021) 46 *European Law Review* 687.

³⁶³ EU:C:2017:699, para. 41: 'if those BITs were justified only during the association period and each party was aware that they would become incompatible with the EU and FEU Treaties as soon as the third State concerned had become a member of the Union, why did the accession treaties not provide for the termination of those agreements, thus leaving them in uncertainty which has lasted more than 30 years in the case of some Member States and 13 years in the case of many others?'

³⁶⁴ M. Leloup, D. Kochenov and A. Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*' (2021) 46 *European Law Review* 687.

all other considerations:³⁶⁵ the autonomy of EU law is proclaimed at the expense of all other interests involved, creating an unnecessary conflict with international law, stripping investors of protection and introducing the Copenhagen dilemma into a field of law where it had not been observed, by giving strong preference to ideological proclamations over the steady development and coherent functioning of the rule of law. One cannot be surprised therefore that the tribunals established under the BITs have ignored *Achmea en masse*, churning out awards, which protect investors against, most importantly, the lawless behaviour of the illiberal regimes, *UP (formerly Le Chèque Déjeuner)* and *C.D. Holding Internationale v. Hungary* as well as *Magyar Farming Kft* providing cases in point in the context of Orbán-instigated expropriations.³⁶⁶

An alternative to the *Achmea* collision course that has deprived plenty of investors of any protection in the captured ‘illiberal’ Member States of Central Europe was available: allowing the tribunals under the BITs to refer preliminary questions.³⁶⁷ This road has not been taken, which may leave some investors facing a situation where no effective judicial remedy is available to them at least in the two EU countries recently identified by democracy experts as the *world’s top two* autocratising countries.³⁶⁸

5.4 Stricter interpretation of the concept of ‘issuing judicial authority’ within the meaning of the EAW Framework Decision:³⁶⁹ *Joined Cases C-508/18, OG (Public Prosecutor’s office of Lübeck)* and *C-82/19, PPU PI (Public Prosecutor’s office of Zwickau)*;³⁷⁰ and *Case C-509/18, PF (Prosecutor General of Lithuania)*³⁷¹

In a set of cases which will be collectively referred to below as the *Prosecutors’ Cases*, the Court has adopted a stricter interpretation of the concept of ‘judicial authority’ for the purpose of issuing European Arrest Warrants (EAW). Any prosecutor who can by law be subjected to the instructions of superiors or the ministry in issuing an EAW does not meet the basic criterion of independence

³⁶⁵ B. de Witte, ‘A Selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union’, in M. Cremona and A. Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart Publishing, 2014), 33.

³⁶⁶ *UP (formerly Le Chèque Déjeuner)* and *C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35 (9 October 2018), para. 253; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, (ICSID Case No. ARB/17/27), Award 13 November 2019, <https://www.italaw.com/sites/default/files/case-documents/italaw10914.pdf>. See also Kochenov and Lavranos, op. cit.

³⁶⁷ E.g. K. von Papp, ‘Clash of “autonomous Legal Orders”: Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ’ (2013) *Common Market Law Review* 1039.

³⁶⁸ See V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 38.

³⁶⁹ Council Framework Decision 2002/584 of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190 45/1.

³⁷⁰ EU:C:2019:456.

³⁷¹ EU:C:2019:457.

according to the Court. Importantly, whether such instructions are indeed issued or not in practice is irrelevant in the context of the test employed by the Court: only *structurally independent* bodies, where this independence is established by law, could qualify as ‘judicial authority’.

The cases discussed below are telling examples picked from a much larger and growing line of cases, making the basic rule above not merely a persuasive authority, but crystal clear binding law.³⁷² The implications of the heightened scrutiny of the structural independence of the ‘judicial authorities’ in the context of the EAW has direct and significant implications for the operation of mutual trust between the Member States experiencing rule of law backsliding and the rest of the Union, potentially making it easier to set aside requests coming from such countries on the grounds of structural independence, instead of going down the rabbit-hole of the *LM* test, which is discussed *infra* in Section 5.5.

JUDGMENT OF THE COURT (Grand Chamber)

27 May 2019

**In Joined Cases C-508/18 and C-82/19 PPU,
REQUESTS for a preliminary ruling under Article 267 TFEU from the
Supreme Court (Ireland), made by decision of 31 July 2018, received
at the Court on 6 August 2018, and from the High Court (Ireland),
made by decision of 4 February 2019, received at the Court on 5
February 2019, in proceedings relating to the execution of European
arrest warrants issued in respect of
OG (Public Prosecutor’s office of Lübeck) (C-508/18)
*PI (Public Prosecutor’s office of Zwickau) (C-82/19 PPU)***

[For ease of reading, references to previous cases have been omitted]

Excerpts:

49 That term [‘judicial authority’] requires, throughout the European Union, an autonomous and uniform interpretation, which, in accordance with the settled case-law of the Court, must take into account the wording of Article 6(1) of Framework Decision 2002/584, its legislative scheme and the objective of that framework decision.

³⁷² See L. Baudrihaye-Gérard, ‘Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors’, *EU Law Analysis*, 2 January 2020: <<http://eulawanalysis.blogspot.com/2020/01/can-belgian-french-and-swedish.html>> (‘The CJEU adopts, in these judgments, a formalistic approach towards the concept of independence [...] However, the CJEU does not seek to enquire into the practice or other potential forms of influence of the executive over prosecutors. The scope of the CJEU’s assessment of the independence of prosecutors is moreover limited to decisions to issue EAWs, and not to the exercise of prosecutorial powers more broadly, which is beyond the scope of EU law’).

[...]

67 The European arrest warrant system therefore entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision.

[...]

70 Where those requirements are met, the executing judicial authority may therefore be satisfied that the decision to issue a European arrest warrant for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584.

71 The second level of protection of the rights of the person concerned, referred to in paragraph 67 of the present judgment, means that the judicial authority competent to issue a European arrest warrant by virtue of domestic law must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant.

72 It is for the ‘issuing judicial authority’, referred to in Article 6(1) of Framework Decision 2002/584, namely the entity which, ultimately, takes the decision to issue the European arrest warrant, to ensure that second level of protection, even where the European arrest warrant is based on a national decision delivered by a judge or a court.

73 Thus, the ‘issuing judicial authority’, within the meaning of Article 6(1) of Framework Decision 2002/584, must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive.

[...]

87 Although the effect of that legal remedy is to ensure that the exercise of the responsibilities of a public prosecutor's office is subject to the possibility of review by a court a posteriori, any instruction in a specific case from the minister for justice to the public prosecutors' offices concerning the issuing of a European arrest warrant remains nevertheless, in any event, permitted by the German legislation.

[...]

90 In the light of all the foregoing, the answer to the questions referred is that the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.

JUDGMENT OF THE COURT (Grand Chamber)

27 May 2019

Case C-509/18

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 31 July 2018, received at the Court on 6 August 2018, in proceedings relating to the execution of a European arrest warrant issued in respect of
PF (Prosecutor General of Lithuania)

[For ease of reading, references to previous cases have been omitted]

Excerpts:

29 In the first place, in that regard, it should be noted that the Court has previously held that the words 'judicial authority', contained in that provision, are not limited to designating only the judges or the courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia ministries or police services which are part of the executive.

[...]

37 The issuing of a European arrest warrant may thus have two distinct aims, as laid down in Article 1(1) of Framework Decision 2002/584. It may be issued either for the purposes of conducting a criminal prosecution in the

issuing Member State or for the purposes of executing a custodial sentence or detention order in that Member State.

38 Therefore, in so far as the European arrest warrant facilitates free movement of judicial decisions, prior to judgment, in relation to conducting a criminal prosecution, it must be held that those authorities which, under national law, are competent to adopt such decisions are capable of falling within the scope of the framework decision.

[...]

47 It follows that, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, the national judicial decision, such as a national arrest warrant, on which the European arrest warrant is based, must, itself, meet those requirements.

48 Where those requirements are met, the executing judicial authority may therefore be satisfied that the decision to issue a European arrest warrant for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584.

[...]

54 In the present case, it is clear from the written observations of the Lithuanian Government that in Lithuania the responsibility for the issuing of European arrest warrants ultimately lies with the Prosecutor General of Lithuania who acts on a request from the specific public prosecutor dealing with the case in connection with which the surrender of the person concerned is sought. In exercising the powers conferred on him, the Prosecutor General of Lithuania must satisfy himself that the requirements necessary in order to issue a European arrest warrant are met, in particular that a judicial decision having the immediate effect of remanding that person in custody has been made and that, in accordance with Lithuanian law, that decision has been made by a judge or a pre-trial investigation court.

55 The Lithuanian Government also stated in its written observations that, in exercising their functions, Lithuanian public prosecutors enjoy the benefit of independence conferred by the Constitution of the Republic of Lithuania, in particular in the third paragraph of Article 118 thereof, and

by the provisions of the Lietuvos Respublikos prokuratūros įstatymas (Law on the Public Prosecutor's Office of the Republic of Lithuania). Since the Prosecutor General of Lithuania is a public prosecutor, he has the benefit of that independence, which allows him to act free of any external influence, inter alia from the executive, in exercising his functions, in particular when he is to decide, as in the case in the main proceedings, whether to issue a European arrest warrant for the purposes of prosecution. In that capacity, the Prosecutor General of Lithuania is also required to ensure respect for the rights of the persons concerned.

56 In the light of those factors, it is apparent that the Prosecutor General of Lithuania may be considered to be an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, in so far as, in addition to the findings in paragraph 42 of the present judgment, his legal position in that Member State safeguards not only the objectivity of his role, but also affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant. Nevertheless, it cannot be ascertained from the information in the case file before the Court whether a decision of the Prosecutor General of Lithuania to issue a European arrest warrant may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, which it is for the referring court to determine.

Analysis

The *Prosecutors' cases* significantly tighten the interpretation of the requirement of independence as applied to the concept of 'issuing judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584.³⁷³ As made clear by the Court, contrary to the position of AG Campos Sánchez-Bordona, who suggested that public prosecutors should not be covered by the notion of 'issuing judicial authority', this idea of 'judicial authority' is not necessarily limited to a Member State court. As long as the authority in question is fully and structurally independent from the executive – itself a demanding threshold – it can qualify as a 'judicial authority'.

³⁷³ A.H. Ochnio, 'Why Is a Redefinition of the Autonomous Concept of an "Issuing Judicial Authority" in European Arrest Warrant Proceedings Needed?' (2020) 5(3) *European Papers* 1305; M. Böse, 'The European Arrest Warrant and the Independence of Public Prosecutors: *OG & PI, PF, JR & YC*' (2020) 57 *Common Market Law Review* 1259; C. Heimrich, 'European Arrest Warrants and the Independence of the Issuing Judicial Authority – How Much Independence Is Required?' (2019) 10 *New Journal of European Criminal Law* 389; K. Ambos, 'The German Public Prosecutor as (No) Judicial Authority within the Meaning of the European Arrest Warrant' (2019) 10 *New Journal of European Criminal Law* 399.

The parallelism of the general lines of case law on the requirement of independence developed in the context of the EAW Framework Decision and in the context of the preliminary reference procedure emerges in full clarity. The Court is consistent in its reasoning across different fields of EU law. The requirement of independence of judicial authorities engaging in dialogue with the Court of Justice under Article 267 TFEU, just as the requirement of independence for judicial authorities acting under the Framework Decision, is thus steadily reinforced. Contrary to some criticism according to which higher thresholds of independence required from ‘judicial authorities’ in the EAW context undermines mutual trust,³⁷⁴ we submit that the opposite is true: mutual trust is only possible between fully independent authorities engaged in cooperation and dialogue without any fear of undue interference from executive bodies. The issue of independence becomes particularly acute in a context of sustained and spreading rule of law backsliding in the EU.

The test embraced by the Court of Justice in the *Prosecutors’ Cases* is almost deceptively simple. Any formal possibility in law – even if never used in practice – to receive instructions from the executive in the exercise of one’s functions instantly disqualifies a body from issuing EAWs. The distinction between the case involving the Lithuanian Prosecutor General, who is fully independent in accordance with the constitution of that Member State, and the German prosecutors, who may well enjoy a higher level of independence in practice than the Lithuanian colleague but who are, at least theoretically, not absolutely shielded by the law from possible instructions from the Minister, is crucial. The basic framework of absolute independence in law, and not merely in fact, is a crucial factor from an EU law perspective.

Implications of the Court’s strict approach

The implications of such a strict approach for EAWs from authorities located in backsliding Member States is difficult to underappreciate: independence is crucially reliant on the absolute impossibility in law of outside interference with the functioning of the ‘issuing judicial authority’. In practice, this means that any institution – be it a prosecutor or a court – which is not impeccably independent not only in fact but also in law – *Banco de Santander SA* sends a similar warning – will not be regarded benevolently in the context of EU law. It follows in this context that any practice that would amount to undermining the independence of the judicial authority as guaranteed by law would, in addition to amounting to a breach of the law, equally disqualify the judicial authority from EAW cooperation.

³⁷⁴ See e.g. A. Klip, ‘Eroding Mutual Trust in an European Criminal Justice Area without Added Value’ (2020) 28 *European Journal of Crime, Criminal Law and Criminal Justice* 109.

The *Prosecutors' cases* clearly reinforce the significance of the idea of independence in the context of EU law. In addition, they reinforce the idea that 'issuing judicial authority' – similarly to a 'court or tribunal of a Member State' in the sense of Art 267 TFEU – is unquestionably an autonomous concept of EU law. It is therefore for the Court of Justice to have the final say when it comes to defining and interpreting this concept.

The cases do not go as far enough, however, in establishing the level of the threshold of judicial independence required – especially if we recall what the learned AG proposed. In this sense, again drawing some parallels with *Banco de Santander SA*, we can clearly see that a further tightening of the independence of the 'issuing judicial authority' criterion is possible and, moreover, likely. We could refer in this respect to AG Campos Sánchez-Bordona, who went further than the Court in scrutinising the essence of the notion of 'independence' in the context of the *Prosecutors' Cases*. The key question the AG sought to answer in this respect concerns the objective of independence of a particular authority, which would clearly have implications for the threshold required. As the AG states in *PF*:

24. A judge exercising jurisdiction does not have any interest other than ensuring the integrity of the legal system. In order to safeguard that interest, he is granted independence which ensures that he is subject only to the law; that is to say, it ensures that he is not bound by any other particular interest, including other public interests such as facilitating the prosecution of crimes.

25. Authorities which, like the Public Prosecutor's Office, perform public functions within the legal system, rely on the judicial branch to ensure the integrity of that system. It is precisely because of that reliance that those authorities are able to devote themselves to pursuing the specific interests corresponding to their functions.³⁷⁵

Although the Court did not pick up on this point, this vision is bound to resurface in the future conversation between national courts and the Court of Justice concerning the meaning of the concept of 'issuing judicial authority'. The question 'independence *for what?*', highlighting the purpose of independence, remains a fundamental one.

This same question has essentially been raised by Professor Kosař and other critics of the pre-accession promotion of strong judicial self-governance by the European Commission in the Member States-to-be of Central and Eastern

³⁷⁵ Opinion of AG Campos Sánchez-Bordona delivered on 30 April 2019 in Case C-509/18, EU:C:2019:338.

Europe.³⁷⁶ The goal of independence of the judicial *corpus*, reinforced by the establishment of a self-governance body, can obviously also cause problems, as opposed to only generating gains. When applied to public prosecutors, the aims of independence, as explained by AG Campos Sánchez-Bordona, are radically different from those pursued by installing robust safeguards to the independence of the judiciary, and the Court is bound to return to this point sooner or later.

Raising the bar

Such possible criticism of the case law notwithstanding, the general vector of development of EU law with regard to the understanding of the role that independence plays in the context of framing the EU-law concept of ‘issuing judicial authority’ is commendable. The overall direction is unquestionably one of raising the bar, so to speak. This direction is the same as what we saw in *Banco de Santander SA* and forms a clear trend which can be discerned in EU law across the board. Independence as a core element of the rule of law has gained prominence and is reshaping the fundamental approaches to the judiciary and the bodies potentially endowed with judicial functions in the context of the EU law-based EAW system.

As regards the *Prosecutors’ Cases*, they establish a much more stringent requirement of independence than the one implied in the *LM* test which will be critically analysed below. In a nutshell, the *LM* test is a two-pronged test to be applied in a situation where a judicial authority is called upon to execute a EAW originating from a rule of law backsliding country: systemic or generalised deficiencies liable to affect the independence of the national judiciary as a whole must then be tested alongside the independence of the specific judge in the specific case before the execution of a EAW may be refused. As we see from the *Prosecutors’ Cases*, the second prong of the *LM* test becomes redundant once the independence of the ‘judicial authority’ in the context of EAW is at issue. To follow Martin Böse, ‘the mere (abstract) possibility that the decision to issue a European arrest warrant may be subject to political interference would disqualify the court as an issuing judicial authority’.³⁷⁷

This is very significant in the context of defending the rule of law in the backsliding Member States for two reasons. The first is flexibility. Given that, as we explained above, individual judges may still be able to act independently

³⁷⁶ D. Kosař, ‘Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe’ (2018) 19 *German Law Journal* 1567 (and the literature cited therein). See also for the argument that the issue of the independence of the judiciary should not only be about the institutions but also about judicial mentality and self-image, to avoid empty institutional mimicry, M. Bobek, ‘The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries’ (2008) 14(1) *European Public Law* 99.

³⁷⁷ M. Böse, ‘The European Arrest Warrant and the Independence of Public Prosecutors: *OG & PI, PF, JR & YC*’ (2020) 57 *Common Market Law Review* 1259, at 1279.

even in a broader context of the executive's attacks on judicial independence, it seems appropriate to differently assess the independence of prosecutors' offices as opposed to the independence of individual judges/courts. Applying the current *Prosecutors' Cases* test of independence to the Polish judiciary could deprive independent Polish judges fighting for their own independence of the possibility to refer questions to the Court of Justice, which many of them have done even though it has meant, sadly, seriously imperilling their professional career not to mention their personal and family life in the process.³⁷⁸

The second is the expectation of coherence: deploying two tests of independence side-by-side, regardless whether this is intended, naturally creates tensions between them. Given that the stricter test would presumably be preferred, the *LM* test, which has been rightly criticised as unworkable in practice, as will be shown below, will have to be adapted in the light of Court's renewed emphasis on the structural legal guarantees of independence established in the *Prosecutors' Cases*. This opens additional possibilities for the improved protection of human rights in Europe, but also requires careful manoeuvring by the Court of Justice in order not to throw the baby out with the bathwater: depriving individual still-independent judges of the possibility of asking the Court of Justice to come to their rescue via the EU preliminary ruling procedure. In an EAW context, however, as will be discussed further below, the fact that Poland still has many independent, brave judges is no ground to disregard the structural violation of the fundamental right to a fair trial considering the current reality of a hijacked judiciary in a country whose current authorities and satellite bodies have *legalised* the *systemic violation* of EU judicial independence requirements in addition to nullifying the Court of Justice's ruling in *AK*.³⁷⁹

Looking beyond the EAW framework and as regards national prosecution services, one may finally note that that the Court has already addressed the issue of when these are being used to undermine judicial independence via special units targeting judges *and* prosecutors,³⁸⁰ with the Court also due to soon address the issue of the corrupting practice of 'seconded judges' whose secondment may be terminated at any moment at the discretion of the Polish Minister of Justice

³⁷⁸ At the same time, one must be aware of ongoing attempts by individuals irregularly appointed to Poland's Supreme Court following an inherently deficient appointment procedure to legitimise themselves by seeking to get the Court to accept their requests for a preliminary ruling. If not addressed, this could also tempt autocratic authorities to asphyxiate the Court or bring it into disrepute with bad faith requests. See L. Pech, 'Polish ruling party's "fake judges" before the European Court of Justice: Some comments on (decided) Case C-824/18 *AB* and (pending) Case C-132/20 *Getin Noble Bank*', *EU Law Analysis*, 7 March 2021: <<http://eulawanalysis.blogspot.com/2021/03/polish-ruling-partys-fake-judges-before.html>>

³⁷⁹ For a comprehensive and recent account, see L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

³⁸⁰ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' et al.*, EU:C:2021:393.

who is simultaneously the General Prosecutor³⁸¹ following the adoption of a law described as ‘unacceptable in a state governed by the rule of law’ by the Venice Commission.³⁸²

5.5 Stricter defence of the right to an independent tribunal in a situation of systemic or general deficiencies as regards the rule of law: C-216/18 PPU LM³⁸³

In *LM* (also informally known as *Celmer*), the Court of Justice was presented with its first opportunity to address a crucial issue: can an executing judicial authority refuse to execute an EAW when there is ample evidence that the independence of the authority which issued the EAW is located in a country where judicial independence has been *structurally* compromised and the ‘very core of the principle of the presumption of innocence is undermined when one and the same person – the Minister for Justice/General Prosecutor – may, in criminal cases, exert influence on both the prosecutors and certain judges on the bench’?³⁸⁴ In this judgment the Court adopted for the very first time a new, two-pronged rule of law test which may however be viewed as self-contradictory and unworkable in practice, in addition to being difficult to reconcile with the Court of Justice’s own case law on judicial independence. To put it differently, the Court sought both to preserve mutual trust in the Area of Freedom, Security, and Justice and defend judicial independence. The end result was however an unworkable test which preserved mutual trust at the cost of the individual fundamental right to a fair trial, while doing nothing to dissuade the Polish authorities from further attacking their courts and independent judges.

Notwithstanding this criticism and the seemingly inexorable move towards an effective *Polexit* from the EU legal order,³⁸⁵ the Court of Justice has so far refused to adapt its EAW test to the unforgiving reality of rule of law backsliding as it is unfolding in Poland. Indeed, in a subsequent preliminary case originating from the Netherlands decided on 17 December 2020, the Court continued to hold that the existence of evidence of systemic or generalised deficiencies concerning judicial independence in Poland, or even *an increase* in those deficiencies, does not in itself justify the judicial authorities of other Member

³⁸¹ Opinion of AG Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, EU:C:2021:403 (EU law precludes the Polish practice of secondment of judges to higher courts that may be terminated at any moment at the discretion of the Minister of Justice, who is simultaneously the General Prosecutor).

³⁸² Opinion on the Act on the Public Prosecutor’s Office as amended, Opinion 892/2017, para. 97 (2016 Polish Act has created a system with ‘wide and unchecked powers’ which ‘is unacceptable in a state governed by the rule of law as it could open the door to arbitrariness’).

³⁸³ EU:C:2018:586.

³⁸⁴ Opinion of AG Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim et al.*, EU:C:2021:403, para. 197.

³⁸⁵ M. Taborowski, ‘On the PM Morawiecki motion to the Constitutional Tribunal regarding EU Treaties conformity with the Polish Constitution (case K 3/21)’, *Rule of Law in Poland*, 27 April 2021: <<https://ruleoflaw.pl/on-the-pm-morawiecki-motion-to-the-constitutional-tribunal-regarding-eu-treaties-conformity-with-the-polish-constitution-case-k-3-21/>>

States refusing to execute an European Arrest Warrant issued by a Polish judicial authority.³⁸⁶ Shortly after this judgment of the Court of Justice, it was revealed that the independent judges of Poland's Supreme Court, including its *criminal* chamber, are likely to be subject to bogus criminal charges on the basis of which the ruling party's 'disciplinary chamber' may then in turn waive their judicial immunity and suspend them.³⁸⁷ The situation is now so out of control that a Polish judge unlawfully suspended by a body itself suspended by the Court of Justice (the 'Disciplinary Chamber') for seeking to apply the Court's ruling in *AK* (itself unlawfully nullified by the same 'Disciplinary Chamber') has been to date unable to get reinstated, even after a Polish court held his suspension to be unlawful.³⁸⁸ Meanwhile, mutual trust is supposed to remain the principle and a refusal to execute an EAW from authorities located in Poland the exception.

JUDGMENT OF THE COURT (Grand Chamber)

25 July 2018

Case C-216/18 PPU

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 23 March 2018, received at the Court on 27 March 2018, in proceedings relating to the execution of European arrest warrants issued against LM

[For ease of reading, references to previous cases have been omitted]

Excerpts:

34 Thus, by its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must

³⁸⁶ Joined Cases C-354/20 PPU, *L* and C-412/20 PPU, *P*, EU:C:2020:1033.

³⁸⁷ M. Jałoszewski, 'National Prosecutor's Office to raid the Supreme Court', *Rule of Law in Poland*, 22 March 2021: <<https://ruleoflaw.pl/national-prosecutors-office-to-raid-the-supreme-court>>

³⁸⁸ I. Görke, 'Judge suspended for implementing a CJEU ruling won a case that lets him return to the bench. His superior refuses to comply', *Wyborcza.pl*, 26 April 2021: <<https://wyborcza.pl/7,173236,27022183,head-of-local-court-refuses-to-comply-with-decision-allowing.html>>

determine, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State. If the answer is in the affirmative, the referring court asks the Court of Justice to specify the conditions which such a check must satisfy.

[...]

36 Both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter, are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.

37 Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union.

[...]

46 In the present instance, the person concerned, relying upon the reasoned proposal and the documents to which it refers, has opposed his surrender to the Polish judicial authorities, submitting, in particular, that his surrender would expose him to a real risk of a flagrant denial of justice on account of the lack of independence of the courts of the issuing Member State resulting from implementation of the recent legislative reforms of the system of justice in that Member State.

47 It should thus, first of all, be determined whether, like a real risk of breach of Article 4 of the Charter, a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in the second paragraph of Article 47 of the Charter is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to a European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584.

48 In that regard, it must be pointed out that 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.

[...]

60 Thus, where, as in the main proceedings, the person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the individual concerned will suffer a breach of that fundamental right, when it is called upon to decide on his surrender to the authorities of the issuing Member State.

61 To that end, the executing judicial authority must, as a first step, assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment.

62 Such an assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by the second paragraph of Article 47 of the Charter.

63 As regards the requirement that courts be independent which forms part of the essence of that right, it should be pointed out that that requirement is inherent in the task of adjudication and has two aspects. The first aspect, which is external in nature, presupposes that the court concerned exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

64 That essential freedom from such external factors requires certain guarantees appropriate for protecting the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office.

Their receipt of a level of remuneration commensurate with the importance of the functions that they carry out also constitutes a guarantee essential to judicial independence.

65 The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.

66 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In order to consider the condition regarding the independence of the body concerned as met, the case-law requires, *inter alia*, that dismissals of its members should be determined by express legislative provisions.

67 The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display 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. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which 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.

68 If, having regard to the requirements noted in paragraphs 62 to 67 of the present judgment, the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.

69 That specific assessment is also necessary where, as in the present instance, (i) the issuing Member State has been the subject of a reasoned proposal adopted by the Commission pursuant to Article 7(1) TEU in order for the Council to determine that there is a clear risk of a serious breach by that Member State of the values referred to in Article 2 TEU, such as that of the rule of law, on account, in particular, of actions impairing the independence of the national courts, and (ii) the executing judicial authority considers that it possesses, on the basis, in particular, of such a proposal, material showing that there are systemic deficiencies, in the light of those values, at the level of that Member State's judiciary.

70 It is apparent from recital 10 of Framework Decision 2002/584 that implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with the consequences set out in Article 7(3) TEU.

71 It thus follows from the very wording of that recital that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU, including the principle of the rule of law, with a view to application of the European arrest warrant mechanism being suspended in respect of that Member State.

72 Therefore, it is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected.

73 Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State which is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, 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.

74 In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject.

75 If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will 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, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant.

76 Furthermore, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk.

[...]

79 In the light of the foregoing considerations, the answer to the questions referred is that Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the framework decision, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.

Analysis

In a situation where the separation of powers is being destroyed in plain sight, and the independence of the courts has been methodically undermined with the top criminal court itself the subject of the most serious and unlawful interferences,³⁸⁹ it would appear most reasonable to consider that expecting justice in individual cases from such a judiciary is by definition not possible.³⁹⁰ This is the position adopted by the Court of Justice in *Prosecutors' Cases*: no structural independence means no independence, as previously discussed. Similar assumptions guided the Irish judge drafting the preliminary questions in *LM* (or *Celmer*, before the Irish courts). Many hopes among prominent commentators concerned the idea that the Court of Justice would come up with a direct and clear assessment of the concrete threats to the judiciary of the Member State in question;³⁹¹ that the Court would build on *Portuguese Judges* and rule on the basis of giving clear priority to the importance of both the safeguarding of the rule of law and the protection of fundamental rights of the individuals concerned.³⁹² Indeed, when the judicial branch as a whole is structurally compromised, it would seem difficult to contend that a fair trial can be obtained as one should not have to

³⁸⁹ See most recently, M. Jałoszewski, 'After Tuleya, Disciplinary Chamber is taking on Prof. Wróbel from the Supreme Court', 29 April 2021: <<https://ruleoflaw.pl/after-tuleya-the-disciplinary-chamber-is-taking-on-prof-wrobel-from-the-supreme-court/>> ('In addition to Professor Włodzimierz Wróbel, the prosecutor's office also wants the immunity of two other judges from the Criminal Chamber to be lifted' in order to bring manifestly spurious criminal charges against them. The DC's panel of usurpers in this case has for rapporteur the individual who unlawfully suspended Judge Juszczyzyn when he attempted to apply the Court of Justice's ruling in *AK*).

³⁹⁰ See however T. Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: *LM*' (2019) 56 *Common Market Law Review* 743, at 755: 'As such, executing judges need to be careful in their individual assessment not to be prejudiced against Poland in all situations.' For an opposing view, see L. Pech, P. Wachowicz and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1, pp. 37–38: 'the right to a fair trial in Poland can be said to be systematically violated following the adoption of the muzzle law in a situation where the ECJ order of 8 April 2020 is furthermore openly violated and the ECJ judgment of 19 November 2019 formally recognised as lacking legal effect in Poland, and where disciplinary proceedings are initiated against all judges who try to execute this judgment [...] Polish courts can no longer be considered "judicial authorities" notwithstanding the continuing bravery of so many individual judges. We cannot however leave the right to a fair trial at the mercy of individual judges' bravery in a situation where each Polish judge may be subject to arbitrary disciplinary sanctions for applying EU judicial independence requirements'.

³⁹¹ For further analysis, see P. Bárd and W. van Ballegooij, 'Judicial Independence as a Pre-Condition for Mutual Trust? The ECJ in *Minister for Justice and Equality v. LM*' (2018) 9 *New Journal of European Criminal Law* 353; C. Rizcallah, 'Arrêt "LM": un risque de violation du droit fondamental à un tribunal indépendant s'oppose-t-il à l'exécution d'un mandat d'arrêt européen?' (2018) *Journal de droit européen* 348; M. Wendel, 'Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*' (2019) 15 *European Constitutional Law Review* 17.

³⁹² The difference in approach exhibited by the Court in these two cases is underlined by M. Krajewski, 'Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges' (2018) 14 *European Constitutional Law Review* 792, 793–794.

expect a brave judge simply to be subject to fair and independent proceedings. In *LM*, the Court of Justice was thus presented with an ideal opportunity to clarify the relationship between the principle of mutual trust as a key principle of EU law underlying the EAW system and always presumed, and the imperative to safeguard the fundamental right to a fair trial before an independent and impartial court established by law.

Ill-advised test

The systemic nature of the attacks against courts and the principle of judicial independence in Poland, outlined very well by the referring court, offered the Court of Justice an opportunity to go deeper into the meaning of judicial independence under EU law than what has been done of previous occasions. *LM* raised big expectations, the absolute majority of which, however, did not materialise. This is partly due to the fact that the Court failed to do the work itself, in contrast to what it did in *Portuguese Judges*, and delegated the actual act of assessment to the referring national judge instead. Problematically, however, the Court provided the referring judge with an unworkable and largely illogical two-pronged test, which has continued to puzzle national judges ever since. Moreover, the Court also obliged the judges handling EAW requests to engage in a kind of ‘dialogue’ with potentially non-independent and sometimes outright phony and unlawfully appointed ‘colleagues’ in the judiciaries of the Member States experiencing attacks on the rule of law, ‘presupposing an unlikely scenario that a captured court will admit that it was captured’.³⁹³ The questionable nature of this premise, which underlies the new test, has recently been highlighted by an *Oberlandesgericht* in Karlsruhe which, having sent a number of questions to a Polish court, decided against honouring the EAW request *without* waiting for the answers to come back.³⁹⁴

The test introduced by the Court in *LM* is based – ill-advisedly we would add – on the earlier case of *Aranyosi and Căldăraru*, which however had nothing to do with judicial independence.³⁹⁵ This was bound to produce the wrong test from the start, as you cannot reasonably compare a situation where the rule of law is deliberately and systemically undermined by national authorities to a case where extremely poor conditions of detention are primarily due to

³⁹³ D. Kochenov and P. Bárd, ‘The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU’ (2019) 1 *European Yearbook of Constitutional Law* 243, 274.

³⁹⁴ P. Bárd and J. Morijn, ‘Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU’, *VerfBlog* 19 April 2020: <<https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>>.

³⁹⁵ Case C-404 and 659/15 PPU *Aranyosi and Căldăraru* [2016] EU:C:2016:198. For further analysis, see G. Anagnostaras, ‘Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: *Aranyosi and Căldăraru*’ (2016) 53 *Common Market Law Review* 1683; C. Rizcallah, ‘Le principe de confiance mutuelle: une utopie malheureuse?’ (2019) 118 *Revue trimestrielle de droits de l’homme* 297.

state's underinvestment in its prison system. To put it differently, one cannot address the *structural* curtailment of judicial independence on the basis of a test devised to assess the conditions of detention for *individual* prisoners. Be that as it may, the *LM* test represents an improvement on the 'general and systemic deficiencies'³⁹⁶ test in the field of human rights protection/prison conditions. The test consists of two successive prongs:

- (i) The executing judicial authority must first establish the existence of systemic generalised deficiencies affecting the system of justice of the issuing Member State on the basis of 'objective, reliable, specific and properly updated'³⁹⁷ information, the activation of Article 7(1) TEU being highlighted as a particularly relevant factor in this respect;
- (ii) The executing judicial authority must then establish the risk of a possible breach of fair trial standards in the particular circumstances of the concrete case at hand and in particular, establish whether the systemic deficiencies affect specifically the court with jurisdiction over the suspect should the surrender be granted.

According to the Court, EAW requests cannot therefore be suspended *en masse* even in a situation where the Article 7(1) TEU procedure has been started against the relevant Member State. A specific assessment in *every case* at both general and individual level is required.³⁹⁸

Misreading the EAW Framework Decision

The reason behind the Court being so strict about defending mutual trust when it ought to arguably to be stricter about the protection of the fundamental right to a fair trial, was, apparently, in-built – so the Court saw it – at least in part, into the EAW Decision, since it expressly allows for the general suspension of trust between the judicial authorities of the Member States seemingly *only* in cases when the European Council has ruled on the existence of the breach of the values the Union is built on – the values of Article 2 TEU, on the basis of the Article 7(2) and (3) TEU procedure. Given the high thresholds required under Article 7(2) TEU, which allows for decisions based on unanimity in the

³⁹⁶ See A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 *Common Market Law Review* 59.

³⁹⁷ *LM* judgment, para. 61.

³⁹⁸ D. Kochenov and P. Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU' (2019) 1 *European Yearbook of Constitutional Law* 243.

European Council, it is most unlikely that this procedure – which has been called a ‘nuclear option’³⁹⁹ in reference to the exceptional nature of the situations it is designed to prevent and/or sanction – will be ever put to use.⁴⁰⁰

This reading of the Framework Decision is however arguably factually incorrect. Why? Because it reflects a failure to read a piece of EU secondary legislation in light of the EU primary law as it stood on the day of the ruling, while justifying this failure on grounds of an out-of-date, non-binding recital which simply failed to take into account the current Article 7(1) TEU, though only because this provision did not exist when the Framework Decision on the EAW was adopted. As Petra Bárd and Wouter van Ballegooij explain:

This understanding is based on a reading which disregards the historical evolution of Article 7 TEU. The reason Recital 10 is silent about current Article 7(1) TEU is that it did not exist at the time the Framework Decision had been drafted. Since a preventive arm has been added in the meantime, one could argue that the drafters of the Framework Decision intended to refer to Article 7 as such, and the preventive arm should also be read into Recital 10. Such an interpretation would have been preferable in light of the inherent asymmetry between the individual and the state, especially in the area of criminal law.⁴⁰¹

The trouble with *LM* was of course that the reference ended up before the Court following the ‘mere’ activation of the preventive arm of Article 7 TEU (i.e. Article 7(1) TEU) against Poland, which only allows the European Council to state the *risk* of a breach and would thus be not enough, even if this procedure were concluded (still pending at the time of writing), to justify the ‘wholesale’ suspension of all EAWs issued by Polish judicial authorities. The Court’s maximalist interpretation of the EU Framework Decision also means that ‘even if Poland were to become a formal dictatorship and no unanimous agreement was found to sanction Poland under Article 7(2) and (3) TEU [the sanctioning arm of Article 7 TEU], national courts from other EU countries would still need to assess each EAW on a case-by-case basis’.⁴⁰²

³⁹⁹ See D. Kochenov, ‘Article 7: A Commentary on a Much Talked-About “Dead” Provision’ (2018) 38 *Polish Yearbook of International Law* 166; L. Pech, ‘From “Nuclear Option” to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date’, *VerfBlog*, 13 November 2019: <<https://verfassungsblog.de/from-nuclear-option-to-damp-squib/>>.

⁴⁰⁰ D. Kochenov, ‘Article 7’, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford: OUP, 2019), 88; G. Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law* (Florence: EUI, 2017); D. Kochenov, ‘On Barks, Bites, and Promises’, in U. Belavusau and A. Gliszczyńska-Grabias (eds), *European Constitutionalism* (Oxford: OUP, 2020).

⁴⁰¹ P. Bárd and W. van Ballegooij, ‘The CJEU in the *Celmer* case: One step forward, two steps back for upholding the rule of law within the EU’, *VerfBlog*, 29 July 2018: <<https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>>

⁴⁰² Pech, Wachowicz and Mazur, ‘Poland’s Rule of Law Breakdown’, op. cit.

Unworkable second prong

In practice and leaving aside the historically flawed interpretation of Article 7, the second prong of the *LM* test ‘makes the suspension of surrender almost impossible. It seems to be a disproportionate burden on the individual to show how a systemic breach of the rule of law affects his or her case individually’.⁴⁰³ Addressing the failures of the rule of law through the prism of the violation of an *individual fundamental right* is clearly a problematic approach to the issue at hand, which could hardly bear fruit. It is unquestionable that the norms enshrined in Article 47 of the Charter and Article 19(1) TEU fundamentally differ in nature.⁴⁰⁴ The *LM* Court thus seems to pretend not to take proper notice of this fundamental difference: a right is not a principle and vice versa.⁴⁰⁵

This mistake will not appear new to the careful observers of the rule of law-related case law of the Court of Justice. This is exactly what occurred in *Commission v. Hungary (judicial retirement age)*,⁴⁰⁶ where the Court did not adopt a rule of law framework of analysis applying instead a non-discrimination on the basis of age framework of analysis as suggested by the Commission. This led the Commission to win a Pyrrhic victory while the integrity of the Hungarian judiciary was (and continues to be) undermined. It took a few more years before the Court gave its full force to Article 19(1) TEU in the *Portuguese Judges* case, which in turn convinced the Commission to rely finally and directly on the principle of judicial independence to defend judicial independence.⁴⁰⁷

Reasoning by analogy, we might hope to see at some point a 2.0 version of the *LM* test where the Court finally accepts that honouring an EAW issued by a judicial body which is an integral part of a structurally compromised judicial system cannot be acceptable. It is just not good enough to force the surrender of suspects to a country on the ground that one can still potentially secure a fair trial on a few scattered islands of independence in an ocean increasingly polluted by authoritarianism. This is why the *LM* test can be viewed as a missed opportunity in addition to being seriously misguided. Indeed, as one of the present authors argued with Patryk Wachowiec,

⁴⁰³ D. Kochenov and P. Bárd, ‘The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU’ (2019) 1 *European Yearbook of Constitutional Law* 243, 274.

⁴⁰⁴ See also M. Leloup, ‘An Uncertain First Step in the Field of Judicial Self-Government’ (2020) 16 *European Constitutional Law Review* 1, 19.

⁴⁰⁵ T. Lock, ‘Rights and Principles in the EU Charter of Fundamental Rights’ (2019) 56 *Common Market Law Review* 1201.

⁴⁰⁶ Case C-286/12 *Commission v. Hungary*, EU:C:2012:687 (compulsory retirement of judges). For further analysis, see the annotation of U. Belavusau in (2013) 50 *Common Market Law Review* 1145.

⁴⁰⁷ See *supra* Sections 2 and 3.

in a situation of systemic attacks *targeting the whole judicial system*, there is, by definition, *already* a “real risk” of a breach of the fundamental rights to an independent tribunal and to a fair trial in *every single case*. One may view as particularly unworkable any requirement imposing on a national court acting as executing judicial authority the need to examine the extent to which systemic attacks on the rule of law are liable to have an impact at the level of the courts with jurisdiction over the requested person’s case ... we also find absurd to demand that such a national court request from the issuing judicial authority any information that it considers necessary for assessing whether there is such a risk. This is akin to asking a potentially compromised court to confirm that it is not (or not yet) compromised in a context where judges can be subject to kangaroo disciplinary proceedings just for daring sending questions to the ECJ under Article 267 TFEU.⁴⁰⁸

Undermining mutual trust and the rule of law in the name of saving both

The Court, we submit, in trying to save both mutual trust and judicial independence, paradoxically ended up undermining both. We also respectfully submit that this end result was unlikely to have arisen had the Court looked more carefully at the history of the Framework Decision. In any event, one cannot prioritise an arguably wrong reading of a piece of secondary legislation to undermine some of the most fundamental principles underlying the whole legal order. Indeed, it would seem that answering the question ‘Who is the guardian of judicial independence in Europe?’⁴⁰⁹ based on Recital 10 of the EAW Decision, which gives absolute priority to Article 7(2) TEU as a possible justification for the non-execution of EAWs, is absolutely unacceptable in the context of the towering importance of the principle of the rule of law in Article 2 TEU. This is particularly true, given the emerging clarity regarding the substantive understanding of the meaning of judicial independence as a vital part of the rule of law. It is required by both Articles 19(1) and 267 TFEU, as we have also seen in *Banco de Santander SA* and the *Prosecutors’ Cases*, among countless other examples, and thus supplies a vital element for the whole edifice of the European legal order. The Court’s misstep in answering this crucial question in *LM*, based on *secondary legislation*, will hopefully be corrected as the case law develops. Moreover, one must take account of the problems stemming from *LM*. As any other impossible test, the *LM* approach results in excessively prolonged proceedings and undermines legal certainty, while helping no one. Indeed,

⁴⁰⁸ L. Pech and P. Wachowicz, ‘1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)’, *VerfBlog*, 17 January 2019: <<https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/>>.

⁴⁰⁹ M. Krajewski, ‘Who Is Afraid of the European Council? The Court of Justice’s Cautious Approach to the Independence of Domestic Judges’ (2018) 14 *European Constitutional Law Review* 792, 804.

mutual trust, when based on nothing, is bound to fail as a persuasive element of the law, even in the conditions where it is rigorously enforced.⁴¹⁰

In making it extremely difficult if not impossible to ignore EAW requests originating from rule of law backsliding countries, the Court has partly followed the Opinion of AG Tanchev, who argued for the adoption of an even more stringent test relying on the concept of ‘flagrant denial of justice’.⁴¹¹ This concept, borrowed from the case law of the European Court of Human Rights, is however entirely unsuitable to addressing the deliberate, sustained and structural curtailment of judicial independence. Can we seriously expect a national court only to refuse to honour an EAW in a Guantanamo Bay situation?⁴¹² This stance threatens the very legal order it aims to preserve by driving courts concerned by the standard of the rule of law in a state to disregard case law which is wrongly more concerned with preserving mutual trust than preserving judicial independence and the right to a fair trial of those subject to EAWs issued by authorities located in autocratising countries. However critical we might be of *LM*, which offered a doubly unworkable test unable to protect the rights of the accused in full, it is welcome to see that the Court focused on the ‘real risk of breach of fundamental rights’ as its benchmark, rather than the ‘Guantanamo Bay test’ suggested by AG Tanchev. We need to be particularly careful with the ‘essence of rights’ train of thought, however, as Mattias Wendel rightly warns:⁴¹³ searching for the ‘essence’ can cause us to ignore the actual right.

To conclude, *LM* embraced a flawed test which suffers from major weaknesses, both from a theoretical and practical perspective.⁴¹⁴ The Court may have been worried that a finding that the Polish judicial system is compromised as a whole could prevent individual Polish judges to continue submitting references to it, but this is arguably misguided. The Court could have held – without depriving

⁴¹⁰ Armin von Bogdandy is absolutely right to underline that trust is first and foremost a phenomenon which is not *legal* in nature: A. von Bogdandy, ‘Beyond the *Rechtsgemeinschaft*, with Trust – Reframing the Concept of European Rule of Law’ (2018) *MPIL Research Paper* 2/2018, 13.

⁴¹¹ EU:C:2018:517, para. 85.

⁴¹² *Ibid.*, para. 92.

⁴¹³ M. Wendel, ‘Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after *LM*’ (2019) 15 *European Constitutional Law Review* 17.

⁴¹⁴ P. Bárd and J. Morijn, ‘Luxembourg’s Unworkable Test to Protect the Rule of Law in the EU (Part I)’, *VerfBlog*, 18 April 2020: <<https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/>>; P. Bárd and J. Morijn, ‘Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU (Part II)’, *VerfBlog* 19 April 2020: <<https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>>.

Polish judges of the possibility of referring questions⁴¹⁵ – that the right to a fair trial is systemically compromised in a system where the judges of the top criminal court of last resort are themselves the subject of sham criminal charges⁴¹⁶ and the ‘very core of the principle of the presumption of innocence is undermined when one and the same person – the Minister for Justice/General Prosecutor – may, in criminal cases, exert influence on both the prosecutors and certain judges on the bench’.⁴¹⁷ In any event and at the very least, the Court ought to shift the burden of proof onto the authorities located in a Member State identified as experiencing an autocratising process, especially in a situation where Article 7(1) TEU has been activated.⁴¹⁸ Moreover, to agree with Petra Bárd and John Morijn, the two-pronged test is unsound: ‘if there is a systematic problem, by definition there is an individual problem too. Protecting minimum standards cannot be squared with mutual trust that, based on the Court’s *own* Polish judicial independence case-law, is currently unwarranted, whatever the political and practical ramifications’.⁴¹⁹ Worse, the premise that the imposition of mutual trust as opposed to carefully growing and reinforcing it could be a successful way forward for the safeguarding of the rule of law in the EU is clearly erroneous. Lastly, this decentralisation of the assessment of judicial independence to a multitude of national courts is bound to produce a multitude of potentially contradictory voices, thus undermining rather than reinforcing mutual trust even further. It was therefore unsurprising to see the Irish Supreme Court recently requesting the Court of Justice to once again reconsider its approach regarding EAW surrenders to Poland considering Poland’s systemic rule of law deficiencies which ‘are now even more troubling and of deeper concern following the introduction’

⁴¹⁵ One may note in this context the analysis of AG Bobek according to which Article 19(1) TEU, Article 47 of the Charter, and Article 267 TFEU have the same content but a different purpose. In other words, a ‘slightly different type of examination must be carried out under each of the three provisions’. As far as the concept of ‘court or tribunal’ under Article 267 TFEU, the Court’s analysis tends to focus ‘on a structural issue, at a rather general level: the position of that body within the institutional framework of the Member States. The intensity of the Court’s review with regard to the independence of the body is, within that context, not that intensive’. Opinion of AG Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim et al.*, EU:C:2021:403, paras 163 and 166.

⁴¹⁶ See most recently, M. Jalszewski, ‘After Tuleya, Disciplinary Chamber is taking on Prof. Wróbel from the Supreme Court’, 29 April 2021: <<https://ruleoflaw.pl/after-tuleya-the-disciplinary-chamber-is-taking-on-prof-wrobel-from-the-supreme-court/>> (‘In addition to Professor Włodzimierz Wróbel, the prosecutor’s office also wants the immunity of two other judges from the Criminal Chamber to be lifted’)

⁴¹⁷ *Ibid.*, para. 197. At the very least, this must imply that no surrender can be granted in a situation where a ‘seconded judge’ is or may be involved.

⁴¹⁸ For a proposal to make the *LM* test more workable and the argument that the *real risk* of violation of the fundamental right to an independent tribunal in the issuing backsliding state requires a *moderate* level of danger and should not be mistaken for *near certainty*, see L. Mancano, ‘You’ll never work alone: A systemic assessment of the European Arrest Warrant and Judicial Independence’ (2021) 58 *Common Market Law Review* 683.

⁴¹⁹ Bárd and Morijn, ‘Domestic Courts Pushing for a Workable Test’, *ibid.*

of new laws since the ECJ first established a new rule of law test in the *LM* case.⁴²⁰ Indeed, according to the Court of Justice's own Advocate General Bobek, in a context where the Minister for Justice is the chief prosecutorial body whereas these two institutions should normally function separately, 'the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present' in Poland.⁴²¹ It follows *inter alia* that the very core of the principle of the presumption of innocence can no longer be guaranteed in criminal cases according to AG Bobek.⁴²² Since then, the situation has further deteriorated and reached a possible point of no return with Polish authorities publicly and repeatedly stated that 'there is no possibility' of implementing the Court's order in C-204/21 R (Poland's muzzle law) and the Court's ruling in C-791/19 (Poland's new disciplinary regime for judges)⁴²³ on account of their alleged unconstitutionality.

5.6 Stricter interpretation of the right to a tribunal established by law: Joined Cases C-542/18 RX-II *Simpson* and C-543/18 RX-II *HG*⁴²⁴

The Grand Chamber judgment in *Simpson* and *HG* is connected to the far-reaching and arguably ill-advised changes made in relation to the General Court of the EU, which resulted in the number of General Court ('GC') judges being doubled and the Civil Service Tribunal ('CST') being closed in September 2016.⁴²⁵ Before it became known that the CST would be closed, a public call for applications was published in December 2013 in respect of two judicial posts with a starting date of 1 October 2014. For reasons which need not be summarised here, the Council proved unable to fill those *two* posts while the term of office of a *third* CST judge expired on 31 August 2015. In a Decision adopted on 22 March 2016, the Council decided to appoint *three* rather than *two* judges from the list of candidates established following the call for applications of 2013. The Council justified this manifestly *irregular* course of action 'for reasons of timing' due to the then near closure of the CST on 1 September 2016.

⁴²⁰ Judgment of 23 July 2021 in *Orlowski*, S:AP:IE:2021:000018 and *Lyszkiewicz*, S:AP:IE:2021:000020, para. 55. The Irish Supreme Court also observed at para. 59 that the 'changes that have occurred in Poland concerning the rule of law are, as previously observed, even more troubling and grave than they were at the time when *LM* was decided by the CJEU. It now appears that there are significant issues with regard to the validity of the appointment process for judges in Poland'.

⁴²¹ Opinion of EU Advocate General Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim et al.*, EU:C:2021:403, para. 195.

⁴²² *Ibid.*, para. 197.

⁴²³ 'Polish justice minister says Warsaw cannot comply with EU's court ruling', *Euractiv.com*, 22 July 2021.

⁴²⁴ EU:C:2020:232.

⁴²⁵ For further analysis and references, see A. Alemanno and L. Pech, 'Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System' (2017) 54 *Common Market Law Review* 129.

In three rulings, two of which are the subject of the Court's Grand Chamber judgment of 26 March 2020, the General Court set aside the orders of the CST on the main ground that one of the members of the panel of CST judges had been irregularly appointed in violation of Article 47 CFR and in particular, the principle of the 'lawful judge', to borrow the unusual phrasing used by the General Court which appeared to be inspired from German law.⁴²⁶ The Court of Justice, exercising its review jurisdiction and in line with the reasoning suggested by Advocate General Sharpston, found that the General Court correctly held that the Council had erred in law by using the list of candidates drawn up as a result of the 2013 call for applications to fill the *third* post while the public call had only provided for *two* posts. However, the Court of Justice found no violation of the 'fundamental rules' governing the procedure for the appointment of judges to the EU CST. This led the Court to rule that the applicants did not suffer from a violation of their right to a tribunal established by law notwithstanding the Council's manifest disregard of the 2013 call for applications. It followed that the Court did not have to deal with the issue of whether the principle of legal certainty should preclude judgments which had been delivered by or which involved a judge irregularly appointed from being set aside automatically as a consequence.

Be that as it may, this Grand Chamber judgment is particularly noteworthy as it prefigured a stricter enforcement against backsliding authorities and their 'fake judges' (especially those of Poland) of the requirement that a tribunal must be *established by law*, and by confirming inter alia that *everyone* must be able to invoke *before any court* an infringement of this requirement in relation to possible irregularities vitiating *any* judicial appointment procedure.⁴²⁷

⁴²⁶ The principle of the lawful judge appears to originate from German law. See Opinion of Advocate General Sharpston delivered on 12 September 2019, EU:C:2019:977, para. 101: In Germany, the Federal Administrative Court 'has had occasion to make the point that, notwithstanding its fundamental importance to litigants, the right to a "lawful judge" as provided for in the German Constitution aims in principle only to prevent the risk of manipulation of judicial institutions'.

⁴²⁷ The specific situation of the multiple manifestly unlawful judicial appointments made by Polish authorities is examined *infra* in Section 6.

JUDGMENT OF THE COURT (Grand Chamber)

26 March 2020

**In Joined Cases C-542/18 RX-II and C-543/18 RX-II,
REVIEW, pursuant to the second subparagraph of Article 256(2)
TFEU, of the judgments of the General Court of the European Union
(Appeal Chamber) of 19 July 2018, *Simpson v. Council* (T-646/16 P),
and *HG v. Commission* (T-693/16 P), delivered in the proceedings
Simpson v. Council of the European Union (C-542/18 RX-II),
and
HG v. European Commission (C-543/18 RX-II)**

[For ease of reading, references to previous case law were omitted]

Excerpts:

50 As regards the answer to the question to be reviewed in this case, it is necessary to begin by examining whether, having regard, in particular, to the general principle of legal certainty, the General Court erred in law by setting aside the contested decisions on the ground that the composition of the panel of judges of the Civil Service Tribunal which had delivered those decisions had been irregular because of an irregularity affecting the procedure for the appointment of one of the members of that panel of judges, leading to a breach of the principle of the lawful judge, laid down in the first sentence of the second paragraph of Article 47 of the Charter.

[...]

55 However, it follows from the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, guaranteed by Article 47 of the Charter, that everyone must, in principle, have the possibility of invoking an infringement of that right. Accordingly the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure at issue could lead to an infringement of that fundamental right.

56 It is also necessary to examine whether the fact that none of the parties in the present cases had taken issue with the regularity of the panel of judges that had adopted the contested decisions precluded the General Court from examining that issue of regularity of its own motion.

57 In that regard, it must be emphasised that the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, as composed, it

constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion.

58 Consequently, the General Court did not err in deciding, in the judgments under review, to examine of its own motion the regularity of the composition of the panel of judges that had delivered the contested decisions in so far as the irregularity of that panel of judges had been established in the judgment of 23 January 2018, *FV v. Council* (T639/16 P, EU:T:2018:22).

59 In the judgments under review, the General Court [...], concluded that the Council had failed to comply with the legal framework imposed by the public call for applications of 3 December 2013 by using the list of candidates drawn up as a result of that call for applications to fill the third post.

60 There is no error of law in that conclusion.

[...]

68 It follows from the foregoing considerations that the irregularity in the appointment procedure at issue resulted exclusively from the Council's disregard for the public call for applications of 3 December 2013 and not from an infringement of the requirements under the fourth paragraph of Article 257 TFEU or Article 3 of Annex I to the Statute of the Court of Justice of the European Union.

[...]

71 In that regard, this Court has held that the requirements that courts be independent and impartial form part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, 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. Those requirements require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. As regards appointment decisions

specifically, it is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed.

[...]

75 It follows from the case-law [...] that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.

76 It is in the light of those principles that the Court must examine whether the irregularity committed in the appointment procedure at issue resulted in this instance in an infringement of the parties' right to a hearing by a tribunal previously established by law, as guaranteed by the first sentence of the second paragraph of Article 47 of the Charter.

77 It must be recalled in that regard that, as has been noted in paragraph 68 of the present judgment, that irregularity resulted exclusively from the Council's disregard for the public call for applications of 3 December 2013.

78 It must also be held that the appointment of a judge to the third post complied with the fundamental rules for the appointment of judges to the Civil Service Tribunal contained in the fourth paragraph of Article 257 TFEU and Article 3 of Annex I to the Statute of the Court of Justice of the European Union.

79 In that context, the mere fact that the Council used the list drawn up following the public call for applications of 3 December 2013 to fill the third post is not sufficient to establish an infringement of a fundamental rule of the procedure for appointing judges to the Civil Service Tribunal that is of such a kind and of such gravity as to create a real risk that the Council made unjustified use of its powers, undermining the integrity of the outcome of the appointment process and thus giving rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge appointed to the third post, or of the Chamber to which that judge was assigned.

80 In that respect, the irregularity in the appointment procedure at issue is distinguishable from that at issue in the decision of the EFTA Court of 14 February 2017, *Pascal Nobile v. DAS Rechtsschutz-Versicherungs* [...]. The latter irregularity consisted in the appointment of a judge to the EFTA Court for, exceptionally, a three-year term of office instead of a six-year term, and thus concerned, unlike the irregularity examined in the present cases, the infringement of a fundamental rule in relation to the duration of judges' mandates at that court which was intended to protect their independence.

81 It follows from the foregoing that the Council's disregard for the public call for applications of 3 December 2013 does not constitute an infringement of the fundamental rules of EU law applicable to the appointment of judges to the Civil Service Tribunal that entailed an infringement of the applicants' right to a tribunal established by law, as guaranteed by the first sentence of the second paragraph of Article 47 of the Charter.

Analysis⁴²⁸

This Court's Grand Chamber judgment offers several remarkable aspects. First, both the Advocate General and the Grand Chamber referred to the *right to a tribunal established by law* rather than the *principle of the lawful judge* invoked by the General Court. As noted by AG Sharpston, 'the former is the wording used not only in the first sentence of the second paragraph of Article 47 of the Charter and Article 6(1) of the ECHR but also in the relevant case-law of the European Court of Human Rights'.⁴²⁹

Second, both the AG and the Grand Chamber carefully considered the case law of the European Court of Human Rights regarding the concept of 'established by law' as it stood at the time. The Court of Justice recalled that this concept ensures that 'the organisation of the judicial system does not depend on the discretion of the executive' and 'covers not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case and any other provision of domestic law which, if breached, would render the participation of one or more judges in the examination of a case irregular, including, in particular, provisions concerning the independence and impartiality of the members of the court concerned'.⁴³⁰ Also worth noting is the Court of Justice's reference to the important ruling issued by the second section of European Court of Human

⁴²⁸ This analysis was authored by Laurent Pech and borrows from his paper entitled 'Dealing with 'fake judges' under EU Law: Poland as a Case Study in light of the Court of Justice's ruling of 26 March 2020 in *Simpson and HG*' (2020) *RECONNECT Working Paper* 8: <<https://www.reconnect-europe.eu/publications/working-papers>>

⁴²⁹ *Ibid.*, para. 39.

⁴³⁰ Joined Cases C-542/18 RX-II and C-543/18 RX-II, *op. cit.*, para. 73.

Rights in the case of the ‘Icelandic Judges’.⁴³¹ This ruling issued on 12 March 2019 can be viewed as the equivalent of the Court of Justice’s *Portuguese Judges* ruling, to the extent that it ‘held that where a judge had been nominated to a court in breach of the national rules governing the judicial appointment procedure, the participation of that judge in a panel which had found the applicant guilty of criminal offences constituted *in itself* [our emphasis] a violation of Article 6(1) of the ECHR’.⁴³²

Subsequent to the Court of Justice’s ruling, on 1 December 2020, the Grand Chamber of the European Court of Human Rights largely upheld the ‘logic and the general substance of the test’ introduced by the chamber ruling of 12 March 2019 while adjusting and reformulated it in the form of ‘threshold test’.⁴³³ According to this revised threshold test, designed to help national courts decide (assuming there are independent courts left) when irregularities in a judicial appointment procedure were of such gravity as to entail a violation of the right to a tribunal established by law, three steps must be distinguished: was there (1) a *manifest* breach (2) of any *fundamental* rule of the judicial appointment procedure, and (3) were the alleged violations of the right to a tribunal established by law effectively reviewed and remedied by the domestic courts in a Convention-compliant manner?⁴³⁴ We must note that the Strasbourg Court also held that the

absence of a manifest breach of the domestic rules on judicial appointments does not as such rule out the possibility of a violation of the right to a tribunal established by law. There may indeed be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that Convention right.⁴³⁵

By solemnly confirming that that the concept of ‘established by law’ encompasses by its very nature the process of appointing judges, ECHR judges have not only sent an unmistakable but implicit warning to Polish authorities,⁴³⁶ but also decisively encouraged ECJ judges to follow suit, starting judiciously with a case where irregularities were raised in relation to an EU judicial appointment procedure rather than a national one.

⁴³¹ ECtHR, *Ástráðsson v. Iceland*, CE:ECHR:2019:0312JUD002637418.

⁴³² AG Opinion in C-542/18 RX-II and C-543/18 RX-II, op. cit., para. 70.

⁴³³ ECtHR, *Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, para. 242.

⁴³⁴ *Ibid.*, para. 243–252.

⁴³⁵ *Ibid.*, para. 245.

⁴³⁶ H. P. Graver, ‘A New Nail in the Coffin for the 2017 Polish Judicial Reform: On the ECtHR judgment in the case of Guðmundur Andri Ástráðsson v. Iceland (Application no. 26374/18)’, *Verfblog*, 2 December 2020: <<https://verfassungsblog.de/a-new-nail-in-the-coffin-for-the-2017-polish-judicial-reform/>>

Indeed, and this the third key aspect of *Simpson* and *HG*, the Court of Justice, for the first time, comprehensively addressed the issue of when an irregularity committed in a judicial appointment procedure is such as to entail a violation of Article 47(2) CFR which it interpreted as follows:

[I]t follows from the fundamental right to an effective remedy before an independent and impartial tribunal previously established by law, guaranteed by Article 47 of the Charter, that everyone must, in principle, have the possibility of invoking an infringement of that right. Accordingly the Courts of the European Union must be able to check whether an irregularity vitiating the appointment procedure at issue could lead to an infringement of that fundamental right.⁴³⁷

This can be understood as the Court effectively providing ‘a new remedy’ on the basis of Article 47 CFR and, in doing so, the Court may be said to have finally ‘unveiled the true implications’ of the *Egenberger* judgment,⁴³⁸ in which it held that Article 47 CFR ‘is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such’.⁴³⁹ And since national courts are required to ensure within their jurisdiction the judicial protection for individuals which flows from Article 47 CFR, the Court’s ruling in *Simpson* and *HG* ought to be understood as providing national courts, *and particularly the Polish courts which remain independent*, with an unambiguous legal mandate to review any irregularity in relation to national judicial appointment procedures in light of Article 47 CFR in disputes falling within the scope of EU law. In such a situation, as well-established in the Court’s case law, national courts may disapply if need be, any contrary provision of national law which undermines the full effectiveness of Article 47 CFR. As perceptively observed by Janek Nowak, ‘*Simpson* and *HG* thus puts further flesh on the bones of the second paragraph of Article 19(1) TEU and should therefore be read together’⁴⁴⁰ with the *Portuguese Judges* ruling.

The fourth key, if not ground-breaking, aspect of the Court’s judgment in *Simpson* and *HG* concerns the issue of whether a court is under an obligation to investigate the lawfulness of judicial appointments. For the Court of Justice, the General Court did not commit an error when it decided to examine *of its own motion* the regularity of the panel of CST judges that had adopted the contested decisions in light of the irregularity affecting the judicial appointments to the CST made by the Council. For the Court,

⁴³⁷ Joined Cases C-542/18, RX-II and C-543/18, RX-II, op. cit., para. 55.

⁴³⁸ J.T. Nowak, ‘The staff case that you will never forget! The review judgment of the Court in *Simpson* and *HG*’, *EU Law Live*, 30 March 2020: <<https://eulawlive.com/op-ed-the-staff-case-that-you-will-never-forget-the-review-judgment-of-the-court-in-simpson-and-hg-by-janek-nowak/>>.

⁴³⁹ Case C-414/16 *Egenberger*, EU:C:2018:257, para. 78.

⁴⁴⁰ Op. cit.

the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, *represent the cornerstone of the right to a fair trial* (our emphasis). That right means that *every court is obliged* (our emphasis) to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be verified of the court's own motion.⁴⁴¹

This is yet another crucial development, as this interpretation also undoubtedly 'creates obligations for national courts, both at first instance and on appeal'.⁴⁴² Any national legislation such as Poland's muzzle law, which prevents the 'check' described above from being performed, would be in obvious breach of Article 47 CFR.

Finally, the Court dealt with the issue of irregularity in the appointment procedure at issue and its effect on the parties' right to a tribunal previously established by law. Following a summary of its well-established principles, which establish *inter alia* that the requirements that courts be independent and impartial also require rules to protect the independence of judges in their appointment, the composition of the relevant body, their duration of service, the grounds for abstention, rejection and dismissal, the Court addressed the issue of decisions appointing judges as follows:

it is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed.⁴⁴³

And when summarising both its own case law and the case law of the European Court of Human Rights, the Grand Chamber provided additional details on how to establish a violation of the right to a tribunal established by law in a situation where an irregularity has been established:

[i]t follows from the case-law [...] that an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter, *particularly* (our emphasis) when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in

⁴⁴¹ Joined Cases C-542/18 RX-II and C-543/18 RX-II, *op. cit.*, para. 57.

⁴⁴² J.T. Nowak, *op. cit.*

⁴⁴³ Joined Cases C-542/18, RX-II and C-543/18, RX-II, *op. cit.*, para. 71.

the minds of individuals as to the independence and the impartiality of the judge or judges concerned, *which is the case* (our emphasis) when what is at issue are *fundamental rules* (our emphasis) forming an integral part of the establishment and functioning of that judicial system.⁴⁴⁴

The Court of Justice's phrasing could have been clearer. Indeed, the Court first holds that 'an irregularity committed during the appointment of judges' entails an infringement of the right to a tribunal established by law. This could be misunderstood as meaning that every irregularity in this context automatically entails a violation of the first sentence of Article 47(2) CFR, which is not the case. The Court is instead concerned here with *one type of irregularity* ('of such a kind and of such gravity [...]') – but not necessarily the only type (see the use of 'particularly') – and makes explicit that it is *one type of situation* in which a violation of the first sentence of Article 47(2) CFR may be *presumed*. Therefore, to establish a possible violation of this right, as far as irregular judicial appointment procedures are concerned, we understand the Court's approach as requiring the application of the following test on a case-by-case basis:

[d]oes the irregularity concern fundamental rules forming an integral part of the establishment and functioning of that judicial system such as for instance, any fundamental rules applicable to the appointment of relevant judges or any fundamental rules in relation to the duration of judges' mandates?

If so, the right to a hearing by a tribunal previously established by law under EU law will be violated because in such a situation, the irregularity can be presumed to be of such a kind and of such gravity as to create a real risk that other branches of the state, in particular the executive, may have exercised undue discretion, undermining the integrity of the outcome of the appointment process.

A case-by-case assessment, which presumes that there remain independent courts to undertake it, is therefore required. In the two present cases, the Court of Justice found that the irregularity committed by the Council resulted *exclusively* from its disregard of the legal framework imposed by the public call for applications of 3 December 2013. For the Court, this does *not* amount to a violation of any 'fundamental rule of the procedure for appointing' EU judges – in the present instances, that CST judges were appointed on the basis of a violation of an applicable rule – 'that is of such a kind and of such gravity as to create a real risk that the Council made unjustified use of its powers, undermining the integrity of the outcome of the appointment process', which could then give 'rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge appointed to the third post, or of the Chamber to which that judge was assigned'.⁴⁴⁵

⁴⁴⁴ *Ibid.*, para. 75.

⁴⁴⁵ Joined Cases C-542/18 RX-II and C-543/18 RX-II, *op. cit.*, para. 79.

The situation in Poland's irregularly appointed 'judges' will now be examined in light of the Polish Supreme Court's resolution of 23 January 2020 and the guiding principles established in the case law of both the European Court of Justice and the European Court of Human Rights, with respect to both the right to a tribunal previously established by law and the requirements that courts be independent and impartial.

6 The Court of Justice's latest challenge: Dealing with irregularly appointed 'judges'

Case C-824/18 *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*

While there is ample case law concerning the requirements that courts must be independent and impartial, the Court of Justice had not interpreted and applied the term 'established by law' to review a judicial appointment procedure comprehensively until its Grand Chamber judgment of 26 March 2020 in *Simpson* and *HG*.⁴⁴⁶ While the Court's ruling did not address a national judicial appointment procedure but rather an irregularity affecting the procedure for the appointment of a judge to the former EU Civil Service Tribunal, it was only a matter of time before the Court of Justice's reasoning was extrapolated to a situation where manifest and grave irregularities had affected national judicial appointment procedures, which has been noticeably the case in Poland.

For ease of understanding, it may be helpful briefly to summarise the current situation in Poland⁴⁴⁷ prior to examining the Court's judgment of 2 March 2021 in *AB et al. (Appointment of judges to the Supreme Court – Actions)*⁴⁴⁸ – arguably the most important judgment issued by the Court of Justice to date regarding the extent to which EU law can be used to review *national* judicial appointment procedures and connected judicial review rules – and the two crucial, at the time of finalising this study, pending preliminary cases directly raising questions of whether several individuals appointed by the Polish President to the Supreme Court are proper judges/courts established by law. A recent judgment of the European Court of Human Rights strongly suggests otherwise as the Strasbourg Court spoke of 'an inherently deficient procedure for judicial appointments' as far as the membership of the infamous Disciplinary Chamber of the Supreme Court is concerned with the

⁴⁴⁶ Joined Cases C-542/18 RX-II *Simpson v. Council* and C-543/18 RX-II *HG v. Commission*, EU:C:2020:232.

⁴⁴⁷ For a detailed overview, see L. Pech, 'Dealing with 'fake judges' under EU Law: Poland as a Case Study in light of the Court of Justice's ruling of 26 March 2020 in *Simpson* and *HG* (2020) *RECONNECT Working Paper 8*: <<https://www.reconnect-europe.eu/publications/working-papers>>

⁴⁴⁸ Case C-824/18, EU:C:2021:153.

consequence that this body lacked and continues to lack the attributes of a 'tribunal' which is 'lawful' for the purposes of Article 6 § 1.⁴⁴⁹

As previously highlighted, Poland has been ranked the world's top autocratising country for the period 2010–2020 by democracy experts, primarily due to the sustained and systemic undermining of judicial independence.⁴⁵⁰ In more practical terms, and to put it briefly, having unconstitutionally captured the now unlawfully composed 'Constitutional Tribunal' (hereinafter: CT), the current Polish authorities then unconstitutionally prematurely ended the term of office of the existing National Council for the Judiciary ('NCJ' in English, 'KRS' in Polish) in order to re-establish a new, captured one which could then be used to give a veneer of legality to judicial nominations/appointments and promotions, no matter how manifestly legally defective these nominations/appointments and promotions were. To shield this system from legal challenge, the so-called 'muzzle law' was adopted with the view inter alia of prohibiting Polish (real) judges from reviewing any eventual violation of the fundamental rules applicable to judicial appointments in an obvious breach of EU Law but also ECHR Law.⁴⁵¹

All of these aspects are methodically detailed in the resolution of Poland's Supreme Court of 23 January 2020, in particular the manifestly irregular appointments made to it by Polish President Duda,⁴⁵² with the independent chambers of the Supreme Court holding inter alia that the CECPA 'is comprised entirely of defectively appointed judges'⁴⁵³ while the members of the DC do not belong to a duly appointed court in any way.⁴⁵⁴ The following diagram should help one quickly understand the extent to which Poland's Supreme Court has been compromised by multiple irregular appointments on the back of manifest and

⁴⁴⁹ See judgment of 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719.

⁴⁵⁰ See V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021.

⁴⁵¹ Adding insult to injury, the same law 'makes any examination of complaints relating to the lack of independence of a judge or court subject to the exclusive jurisdiction' of the Extraordinary Control and Public Affairs Chamber of the Supreme Court ('CECPA'). This is however a body which suffers from the same flaws as the Disciplinary Chamber ('DC') and whose members were themselves manifestly appointed on the back of an inherently deficient procedure to use the Strasbourg Court's phrasing. In other words, 'unlawful judges' are supposed to review whether the right to an independent tribunal established by law has been complied with. On 14 July 2021, the Court of Justice ordered the suspension of the provisions of national law which gave exclusive jurisdiction to the CECPA. See Case C-204/21 R examined *supra* in Section 3.1.3.

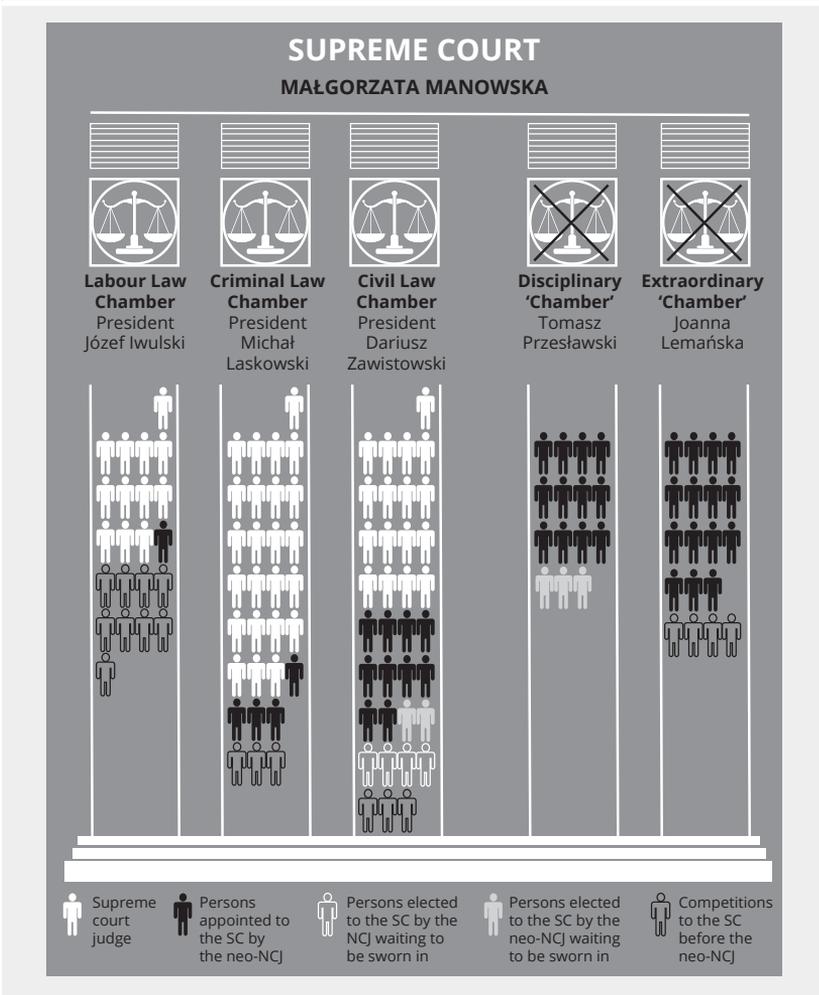
⁴⁵² Supreme Court Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20. English translation available at <<https://www.iustitia.pl/en/activity/informations/3708-resolution-of-the-formation-of-the-combined-civil-chamber-criminal-chamber-and-labour-law-and-social-security-chamber>>.

⁴⁵³ Supreme Court Resolution, op. cit., para. 45.

⁴⁵⁴ *Ibid.*

grave breaches of the fundamental rules governing judicial appointments; the creation of two chambers masquerading as courts (the CECPA and the DC) and the irregular appointment of an ‘unlawful judge’⁴⁵⁵ as its current ‘First President’.

Table 5 Lawful judges and unlawful ‘judges’ of Poland’s Supreme Court as of 17 June 2021



Source: Wolne Sądy, *2000 Days of Lawlessness*, June 2021, p. 30: <https://wolnesady.org/files/2000_days_of_Lawlessness_FreeCourts_Report.pdf>

⁴⁵⁵ M. Krajewski and M. Ziółkowski, ‘Can an Unlawful Judge be the First President of the Supreme Court?’, *VerfBlog*, 26 May 2020: <<https://verfassungsblog.de/can-an-unlawful-judge-be-the-first-president-of-the-supreme-court/>>

Unsurprisingly, and in line with an extensive track record of openly violating inconvenient rulings, Polish authorities have ignored this resolution of 23 January 2020 hiding behind a ‘ruling’ of the unlawfully composed ‘Constitutional Tribunal’ whose interpretation in this instance has been described as arbitrary by the European Court of Human Rights:

261. [...] the Court is not persuaded that the Constitutional Court’s judgment relied on by the Government deprived the Supreme Court’s resolution of its meaning or effects for the purposes of this Court’s ruling as to whether there has been a “manifest breach of the domestic law” in terms of Article 6 § 1. [...] The Constitutional Court, while formally relying on the constitutional principles of the separation of powers and the independence of the judiciary, *refrained from any meaningful analysis* [our emphasis] of the Supreme Court’s resolution in the light of these principles.

The same is true in respect of the Constitutional Court’s interpretation of the standards of independence and impartiality of a court under Article 6 § 1 of the Convention that led it to the conclusion that the Supreme Court’s interpretative resolution was incompatible with that provision. [...]

The Court *sees no conceivable basis in its case-law for such a conclusion* [our emphasis]. [...]

262. Considering the *apparent absence of a comprehensive, balanced and objective analysis of the circumstances before it in Convention terms* [our emphasis], the Court finds that the Constitutional Court’s evaluation must be regarded as *arbitrary and as such cannot carry any weight* [our emphasis] in the Court’s conclusion as to whether there was a manifest breach, objectively and genuinely identifiable as such, of the domestic law involved in the procedure for judicial appointments to the Disciplinary Chamber [...].⁴⁵⁶

Moving beyond this unprecedented but entirely warranted obliteration of the unlawfully composed ‘Constitutional Tribunal’s’ ‘evaluation’ (in the absence of any reasoning) by the European Court of Human Rights, the end result of many years of legal hooliganism is the consolidation of ‘an alternative legal space [...] under which the ruling majority can enact unconstitutional laws, unlawfully appoint members of the Constitutional Tribunal, the National Council of the Judiciary, the Supreme Court, or discipline and prosecute at will those who articulate positions that do not meet its expectations’.⁴⁵⁷ Let us now see how the Court of Justice has begun to rise to this existential challenge to the EU legal order.

⁴⁵⁶ *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719.

⁴⁵⁷ Commissioner for Human Rights A. Bodnar, Written comments of the Commissioner for Human Rights of the Republic of Poland in the case of *Jan Grzęda against Poland* (application no. 43572/18, pending at the time of writing), para. 49.

JUDGMENT OF THE COURT (Grand Chamber)

2 March 2021

Case C-824/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), made by decision of 21 November 2018, received at the Court on 28 December 2018, and which was supplemented by decision of 26 June 2019, received at the Court on 5 July 2019, in the proceedings

A.B.,

C.D.,

E.F.,

G.H.,

I.J.

v.

Krajowa Rada Sądownictwa,

intervening parties:

Prokurator Generalny,

Rzecznik Praw Obywatelskich,

[For ease of reading, references to previous cases have been omitted]

2 The requests have been made in proceedings between A.B., C.D., E.F., G.H. and I.J., and the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) ('the KRS') concerning resolutions by which the latter decided not to propose to the President of the Republic of Poland ('the President of the Republic') the appointment of the persons concerned to positions as judges at the Sąd Najwyższy (Supreme Court, Poland) and to propose the appointment of other candidates to those positions.

[...]

52 In response to a request for additional information sent by the Court to the referring court, the latter stated, in a letter of 14 February 2019, that, although the suspension of execution of the resolutions at issue in the main proceedings had thus been ordered, on 10 October 2018 the President of the Republic had nonetheless appointed to judicial posts at the Sąd Najwyższy (Supreme Court) eight new judges who had been put forward by the KRS in those resolutions. Those eight new judges were not, however, actually assigned to the chambers concerned of the Sąd Najwyższy (Supreme Court), since the presidents of those chambers, in the light of the doubts surrounding the lawfulness of the appointment of the persons concerned and on grounds of legal certainty, suspended their assignment pending the judgments to be delivered by the referring court in the disputes in the main proceedings.

[...]

95 Consequently, while it is in principle permissible for a Member State, for example, to amend its domestic rules conferring jurisdiction, with the possible consequence that the legislative basis on which the jurisdiction of a national court which has made a reference for a preliminary ruling has been established will disappear, or to adopt substantive rules that have the incidental consequence of rendering the case in which such a reference was made devoid of purpose, a Member State cannot, however, without infringing Article 267 TFEU, read in conjunction with the third subparagraph of Article 4(3) TEU, make amendments to its national legislation the specific effects of which are to prevent requests for a preliminary ruling addressed to the Court from being maintained after they have been made, and thus to prevent the latter from giving judgment on such requests, and to preclude any possibility of a national court repeating similar requests in the future.

96 It is ultimately for the referring court to rule whether that is the case here. It must be borne in mind that Article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. According to settled case-law, the Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions.

[...]

100 Secondly, it is apparent from the information available to the Court that the Polish authorities have recently stepped up initiatives to curb references to the Court for a preliminary ruling on the question of the independence of the courts in Poland or to call into question the decisions of the Polish courts which have made such references.

[...]

106 The factors and considerations thus mentioned in paragraphs 99 to 105 of this judgment may prove to be indicia which, by reason of their convergence and, therefore, their systematic nature, seem capable of clarifying the context in which the Polish legislature adopted the Law of 26 April 2019. As was observed in paragraph 96 of this judgment, since in the context of the preliminary ruling dialogue the final assessment of the facts falls solely to the referring court, it is for that court to assess definitively whether those matters and all other relevant matters of which it may have become aware in that regard support the view that the adoption of that

law has had the specific effects of preventing the referring court from maintaining, after they have been made, requests for a preliminary ruling such as that which was initially referred in this case to the Court and thus of preventing the latter from ruling on such requests, and of precluding any possibility of a national court repeating in the future questions for preliminary rulings similar to those contained in the initial request for a preliminary ruling in the present case.

107 If that court were to reach to such a conclusion, it would then be necessary to find that such legislation is detrimental not only to the prerogatives granted to national courts and tribunals in Article 267 TFEU and to the effectiveness of the cooperation between the Court and the national courts and tribunals established by the preliminary ruling mechanism, but also, and more generally, to the task with which the Court is entrusted under the first subparagraph of Article 19(1) TEU and which consists in ensuring that in the interpretation and application of the Treaties the law is observed, as well as to the third subparagraph of Article 4(3) TEU.

[...]

129 Thus, while the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic in the light of the requirements arising from EU law, in particular the second subparagraph of Article 19(1) TEU, the situation is different in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context, and in particular the circumstances in which possibilities for obtaining judicial remedies which previously existed are suddenly eliminated, are such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process.

[...]

131 In paragraphs 143 and 144 of the judgment *A. K. and Others*, the Court thus already identified, from among the relevant factors to be taken into account for the purposes of assessing the requirement of independence which must be satisfied by a body such as the KRS, first, the fact that the KRS, as newly composed, was formed by reducing the ongoing four-year term in office of the members of that body at that time, second, the fact that, whereas the 15 members of the KRS elected among members of the judiciary were previously elected by their peers, those judges are now elected by a branch of the Polish legislature, third, the potential for irregularities which could adversely affect the process for the appointment of certain members of the newly formed KRS, and, fourth, the way in which that body

exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers. In such a context, the possible existence of special relationships between the members of the KRS thus established and the Polish executive, such as those referred to by the referring court and mentioned in paragraph 44 of this judgment, may similarly be taken into account for the purposes of that assessment.

132 In addition, in the present case, account should also be taken of other relevant contextual factors which may also contribute to doubts being cast on the independence of the KRS and its role in appointment processes such as those at issue in the main proceedings, and, consequently, on the independence of the judges appointed at the end of such a process.

[...]

136 If the referring court were to conclude that the KRS does not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates, albeit restricted to what was noted in paragraph 128 of this judgment, would be necessary in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent legitimate doubts from arising, in the minds of individuals, as to the independence of the judges appointed at the end of that process.

137 The provisions of the Law of 26 April 2019 (i) declared that there was no need to adjudicate in pending disputes such as those in the main proceedings in which candidates for judicial positions at the Sąd Najwyższy (Supreme Court) had, on the basis of the law then in force, lodged appeals challenging resolutions by which the KRS had decided not to put them forward for appointment to those positions, but to put forward other candidates, and (ii) removed any possibility of exercising legal remedies of that kind in the future.

138 It must be observed that such legislative amendments, particularly when viewed in conjunction with all the contextual factors mentioned in paragraphs 99 to 105 and 130 to 135 of this judgment, are such as to suggest that, in this case, the Polish legislature has acted with the specific intention of preventing any possibility of exercising judicial review of the appointments made on the basis of those resolutions of the KRS and likewise, moreover, of all other appointments made in the Sąd Najwyższy (Supreme Court) since the establishment of the KRS in its new composition.

139 In the light of what was observed in paragraph 96 of this judgment, it will be for the national court to make a final assessment on the basis of the guidance provided by this judgment and any other relevant circumstances of which it may

become aware, taking account, where appropriate, of the reasons and specific objectives alleged before it in order to justify the measures concerned, whether the fact of having declared, by the Law of 26 April 2019, that there is no need to rule on appeals such as those in the main proceedings and the concomitant removal of any possibility of lodging such appeals in the future, is such as to give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolutions at issue in the main proceedings to external factors and, in particular, to the direct or indirect influence of the Polish legislature and executive, and to lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

[...]

166 Furthermore, if the referring court reaches the conclusion that the retrograde impact of those national provisions on the effectiveness of the judicial remedy available against the resolutions of the KRS proposing the appointment of judges in the Sąd Najwyższy (Supreme Court) infringes the second subparagraph of Article 19(1) TEU, it will be for that court, for the same reasons as those set out in paragraphs 142 to 149 of this judgment, to disapply those provisions and to apply instead the national provisions previously in force while itself exercising the review envisaged by those latter provisions.

[...]

Analysis⁴⁵⁸

AB et al., issued on 2 March 2021, is the Court of Justice's third judgment in a preliminary ruling case originating from a Polish court and raising issues connected to Poland's rule of law breakdown, out of a total of 37 (and counting) rule of law related national requests for a preliminary ruling submitted by Polish courts, compared to a total of four infringement actions lodged with the Court by the Commission to date.

This Grand Chamber judgment is particularly noteworthy for making it unequivocally clear that the Polish authorities violated EU law when they changed

⁴⁵⁸ This analysis borrows from L. Pech, 'Polish ruling party's "fake judges" before the European Court of Justice: Some comments on (decided) Case C-824/18 *AB* and (pending) Case C-132/20 *Getin Noble Bank*', *EU Law Analysis*, 7 March 2021: <<http://eulawanalysis.blogspot.com/2021/03/polish-ruling-party-fake-judges-before.html>>. See also L.D. Spieker, "The importance of being earnest": On frank words and missed opportunities in the CJEU's A.B. judgment' (2021) XLI (no. 2) *Quaderni costituzionali* 435.

Polish law to prevent an effective judicial review of the judicial appointment decisions made by Poland's neo-NCJ in relation to candidates for the office of judge at the Supreme Court. While this is, formally speaking, a matter for the referring court to establish on the basis of the Court of Justice's interpretation of EU law, *AB* leaves no doubt that the relevant provisions in dispute flagrantly violate EU law. We could however expect the Court of Justice's judgment in *AB* to meet the same fate as the Court's judgment in *AK*, which was the first judgment adopted in response to a national request for a preliminary ruling originating from a Polish court. As previously analysed, *AK* was subsequently unlawfully nullified *de facto* and *de jure* by the unlawfully composed CT and the unconstitutional DC. *AB* can be expected to suffer the same unlawful fate as the Polish authorities are now openly claiming that the ECJ would have acted *ultra vires*,⁴⁵⁹ and that the EU would lack the competence to define and enforce the EU rule of law requirements against Member States violating those requirements,⁴⁶⁰ a claim which fundamentally violates Poland's undertakings when it applied for EU membership.

The judgment's novel aspects

The Court of Justice's judgment in *AB* is both rich and significant, which makes a brief analysis challenging. That caveat aside, the *AB* judgment's most important contribution to the defence of the rule of law in the EU is arguably the confirmation that Member States must respect EU requirements relating to judicial independence when they decide to *change* the rules governing the process of appointing judges *and* connected rules governing the judicial review of judicial appointment decisions. National authorities cannot therefore seek to hide behind the national constitution to justify the adoption of arbitrary substantive conditions or procedural rules in respect of judicial appointments; deprive a national court of its previous jurisdiction; force the discontinuation of ongoing appeals and/or prevent national courts from referring questions on judicial appointments to the Court of Justice.

Another important aspect of the Court's judgment is its finding – implying a manifest breach of the EU principle of sincere cooperation – that the Polish legislature adopted the amendments in dispute with the *specific intention* of preventing any possibility of judicial review of all the appointments made to the SC since the neo-NCJ was established. The Court similarly but implicitly finds that Polish authorities acted in a manner which violates the principle of sincere cooperation by deliberately seeking to undermine the functioning of the preliminary ruling procedure by stepping up 'initiatives to curb references to the Court for a preliminary ruling on the question of the independence of the courts

⁴⁵⁹ See in particular Kancelaria Prezesa Rady Ministrów, Wniosek do Trybunału Konstytucyjnego w zakresie nadrzędności Konstytucji RP nad prawem europejskim, 3 March 2021.

⁴⁶⁰ See Kancelaria Prezesa Rady Ministrów, Skarga do Trybunału Sprawiedliwości UE, 11 March 2021.

in Poland’ or calling ‘into question the decisions of the Polish courts which have made such references’.⁴⁶¹

In this context, and for the first time, the Court of Justice denounced the ‘retrograde impact’ of the legislative amendments in dispute, as well as the *unlawful behaviour of the Polish President*. As regards this later aspect, which is also at the heart of pending Cases C-487/19 and C-508/19 examined below, the Court emphasises that the Polish President blatantly ignored a freezing order from Poland’s Supreme Administrative Court when he appointed eight individuals to Poland’s Supreme Court. Another new and noteworthy aspect of *AB* is the mention of the possibility for the referring court to consider inter alia the existence of special relationships between the members of the neo-NCJ and the Polish executive when assessing the independence (or rather, the lack thereof) of the individuals appointed to the Supreme Court in open violation of the Supreme Administrative Court’s freezing order. The existence of this ‘special relationship’ has already been solidly established.⁴⁶²

The Court’s *AB* judgment does arguably suffer from some weaknesses. First, it fails to emphasise that Poland’s ‘CT’ is no longer a court as it is unlawfully composed (the former president of the German FCC accurately described it as a ‘puppet’).⁴⁶³ The European Court of Human Rights has since confirmed the unlawful composition of Poland’s ‘CT’ in *Xero Flor* so it would be good for the Court of Justice to at least refer to this (sad) state of affairs.⁴⁶⁴ Perhaps more surprisingly, the Court of Justice also fails to explicitly address the violation of its own judgment in *AK* by the same ‘CT’ in April 2020 in an unlawful composition and what’s more, in the name of EU law while openly violating EU law in the process...⁴⁶⁵ Furthermore, the Court of Justice did not tackle the issue

⁴⁶¹ Case C-824/18, EU:C:2021:153, para. 100.

⁴⁶² See e.g. M. Pankowska, ‘European judges favour expelling the neo-NCJ from the European Network of Councils for the Judiciary’, *Rule of Law in Poland*, 6 May 2020: <<https://ruleoflaw.pl/european-judges-favour-expelling-the-neo-ncj-from-the-european-network-of-councils-for-the-judiciary/>>

⁴⁶³ See A. Wądołowska, ‘Poland’s constitutional court is a “puppet”, says Germany’s top judge, prompting angry response’, *Notes from Poland*, 14 May 2020: <<https://notesfrompoland.com/2020/05/14/germanys-constitutional-court-president-calls-polish-counterpart-a-puppet-prompting-angry-response/>>.

⁴⁶⁴ See judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718. In response, in another unlawfully composed formation, the CT decided to defiantly declare that the *Xero Flor* judgment ‘non-existent’... For further analysis, see M. Leloup, ‘The ECtHR Steps into the Ring: The Xero Flor ruling as the ECtHR’s first step in fighting rule of law backsliding’, *VerfBlog*, 10 May 2021, <<https://verfassungsblog.de/the-ecthr-steps-into-the-ring/>>; R. Lawson, “Non-Existent”: The Polish Constitutional Tribunal in a state of denial of the ECtHR Xero Flor judgment, *VerfBlog*, 18 June 2021: <<https://verfassungsblog.de/non-existent/>>; B. Grabowska-Moroz, ‘Strasbourg Court Entered the Rule of Law Battlefield’, *Strasbourg Observers*, 13 September 2021.

⁴⁶⁵ On 20 April 2020, in an *unlawful* composition as per the *Xero Flor* judgment, Poland’s ‘Constitutional Court’ issued a judgment declaring that the Supreme Court’s resolution of 23 January 2020 was (allegedly) incompatible with several provisions of the Polish Constitution as well as Articles 2 and 4(3) TEU and Article 6 § 1 ECHR... See summary offered in *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, paras 115–117.

of these manifestly irregular judicial appointments made by Polish President Duda in open violation of several freezing orders by directly relying on the right to a tribunal *established by law*, which would arguably have made it even clearer that we are not dealing with proper judges and proper courts. This later dimension will however be directly tackled in the Court's forthcoming judgment in the currently pending Cases C-487/19 and C-508/19, which is possibly why the Court did not deem it necessary to emphasise what EU law demands from the 'established by law' requirement. Before explaining the importance of these two pending cases, the implementation of the Court of Justice's judgment by Poland's Supreme Administrative Court deserves to be briefly outlined.

Supreme Administrative Court's implementation of Court of Justice's judgment

As previously noted, in response to several appeals against resolutions adopted by the neo-NCJ recommending multiple individuals for appointment to different chambers of the Supreme Court (Civil Chamber; Criminal Chamber and CECPA), Poland's Supreme Administrative Court (hereinafter: SAC) stayed the execution of several ones of them in October 2018. These orders were deliberately ignored by the Polish President following which the SAC made a request for a preliminary ruling to the Court of Justice whose judgment of 2 March 2021 was analysed above. On 6 May 2021, the SAC applied this judgment in five cases⁴⁶⁶ and quashed two resolutions regarding appointments to the Criminal and Civil Chambers. Most crucially, the SAC established that (i) the neo-NCJ does not offer any guarantees of independence from the legislative and executive powers in the process of appointment of judges and must instead be regarded as strictly and institutionally subordinate to the executive represented by the Minister of Justice; (ii) the neo-NCJ intentionally and directly aimed to make it impossible for the SAC to carry out a judicial review of the relevant resolution and (iii) President Duda's announcement of vacancies at the Supreme Court was invalid as it lacked the required countersignature of the Prime Minister which means that this announcement was *contrary to the Polish Constitution* and had resulted in a *deficient procedure* for judicial appointments.⁴⁶⁷

According to the head of Iustitia, the largest association of judges in Poland, 'This means that the acts of appointment of these Supreme Court judges [by the president] are illegal and have no legal effect. They were issued as a consequence of an invalid recruitment, which was a breach of the law from the outset. The Supreme Administrative Court's judgments now allow the judges of the Labour

⁴⁶⁶ II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18 and II GOK 7/18.

⁴⁶⁷ See summary offered in *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, paras 39–45 and paras 122–125.

and Social Insurance Chamber of the Supreme Court to rule that the new Supreme Court judges are not judges.⁴⁶⁸

Unsurprisingly, Polish authorities have refused to draw any consequences whatsoever from the SAC's judgments applying the Court of Justice's interpretation (showing in passing why it is so crucial for the Commission to launch infringement actions to make non-compliance more difficult and costly). Their main (ludicrous) argument is that any eventual, even manifest and grave defects in the appointments would be 'eliminated at the time of signature of the nominations by President Duda'⁴⁶⁹ who, like a modern Sun King, by his mere intervention would allegedly be able to cure any prior illegality. To quote Krystian Markiewicz again, the President of Iustitia, 'the concept that the president's decision is sacrosanct is false', he cannot, like a modern day Emperor Caligula, 'appoint a horse to the office of a judge and say that his decision is unquestionable'.⁴⁷⁰ An additional no less absurd argument has been promoted to justify non-compliance: As the appointment decisions of the Polish President cannot be directly subject to judicial review and formally annulled, they would still allegedly continue to produce legal effects. However, as rightly pointed out by one of the lawyers of the plaintiffs, the SAC

repealed the resolutions of the neo-NCJ to the extent to which it requested the president to appoint judges of the Supreme Court. This means that the legal basis for such an appointment has been cancelled and therefore the judicial nominations are invalid, while the people selected by the neo-NCJ are not judges of the Supreme Court. Because two elements together are needed for a valid nomination: a correct motion of the NCJ, which was not there and a presidential nomination.⁴⁷¹

The European Court of Human Rights has already adopted a similar reasoning by holding that the process of judicial appointments to the Disciplinary Chamber (the same process was followed for other appointments to other chambers made by Polish President Duda) was marred by a breach of domestic law which

inherently tarnished the impugned appointment procedure since, as a consequence of that breach, the recommendation of candidates for judicial appointment to the Disciplinary Chamber – a condition *sine qua non* for appointment by the President of Poland – was entrusted to the NCJ, a body that lacked sufficient guarantees of independence from the legislature and the executive. A procedure

⁴⁶⁸ M. Jałoszewski, 'After the judgment of the Supreme Administrative Court. The nominations for the new Supreme Court judges, including President Manowska, are invalid', *Rule of Law in Poland*, 10 May 2021: <<https://ruleoflaw.pl/supreme-administrative-court-rules-nominations-supreme-court-invalid/>>

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

for appointing judges which, as in the present case, discloses an undue influence of the legislative and executive powers on the appointment of judges is *per se* incompatible with Article 6 § 1 of the Convention.⁴⁷²

In this respect, it is worth noting that one of the individuals concerned by the quashed neo-NCJ resolutions is the current ‘First President’ of the Supreme Court (a former deputy of the Minister of Justice before her irregular appointment) who recently refused to comply with the Court of Justice’s order of 14 July 2021 in C-204/21 R and judgment of 15 July in C-791/19, on account of their alleged unconstitutionality and the fact that they would allegedly be only addressed to Polish authorities, the Supreme Court apparently not being such an authority...⁴⁷³

Dealing with usurpers directly for the first time

The two defendants in the preliminary cases C-487/19 and C-508/19 are individuals who were never judges before being appointed on the basis of manifestly irregular procedures to two new bodies of Poland’s Supreme Court manifestly lacking any independence: the DC⁴⁷⁴ and the CECPA. By contrast, the two plaintiffs in these cases are proper judges, with WŻ a member and spokesperson of the former NCJ⁴⁷⁵ and MF a member of Iustitia and a vocal critic of the ruling coalition’s ‘reforms’, which led her to be subject to multiple blatantly arbitrary disciplinary proceedings. Should the Court of Justice follow the suggestions of AG Tanchev, significant consequences (from an EU law perspective at least) would follow.⁴⁷⁶

To begin with, regarding the scope of the second subparagraph of Article 19(1) TEU, AG Tanchev argues that not only is this Treaty provision directly effective but that any national judge, when acting as a plaintiff seeking to protect his

⁴⁷² *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, para. 276.

⁴⁷³ According to an association of Polish judges, her refusal ‘constitutes a direct violation of the CJEU rulings of 14 and 15 July 2021 and, as such, not only deserves to be absolutely condemned, but should also become the basis for disciplinary and possibly criminal liability’. See Position of the Board of ‘Themis’ of 19 July 2021 – appeal regarding actions openly heading towards PolExit: <<http://themis-sedziowie.eu/materials-in-english/position-of-the-board-of-themis-of-19-july-2021-appeal-regarding-actions-openly-heading-towards-polexit/>>

⁴⁷⁴ See *supra* Section 3.1.3.

⁴⁷⁵ The plaintiff in Case C-487/19 has also lodged a complaint with the European Court of Human Rights in relation to the premature termination of his mandate as a member of the NCJ, his dismissal as spokesperson from that body, and the ensuing campaign to silence him: *Żurek v. Poland*, application no. 39650/18 (pending at the time of writing). One of the present authors submitted a joint third party intervention in this case: See Judges for Judges, *Third Party Intervention in Strasbourg Case Żurek v. Poland*, 26 October 2020, <<https://www.rechtersvoorrechters.nl/third-party-intervention-in-strasbourg-case-zurek-v-poland/>>

⁴⁷⁶ Opinions of AG Tanchev delivered on 15 April 2021 in Case C-487/19 WŻ., EU:C:2021:289 and Case C-508/19, M.F., EU:C:2021:290. The Court is expected to deliver its judgment in Case C-487/19 on 6 October 2021.

professional status, has a right to be judged by an independent and impartial court established by law. In such a situation, any national judge is automatically covered by Article 19(1) TEU. This means that a preliminary ruling question about the status of a potentially fake national judge is always admissible when the national challenge, which becomes the subject of preliminary ruling request, is about any decision adopted by a potentially fake judge and/or a national court which may fail to fulfil the requirements of an independent and impartial court, or the requirements of a tribunal previously established by law. To put it differently, any question relating to a national dispute concerning the status of a judge is admissible. In this respect, and again compellingly in our view, AG Tanchev submits that Article 19(1) can be relied upon by a judge acting as a plaintiff to challenge a court transfer when this amounts to a disguised demotion or a decision to appoint a disciplinary tribunal, especially when this decision is made ‘by a judge whose own appointment breached the very same provision of EU law’.⁴⁷⁷

As regards the DC and the CECPA, AG Tanchev essentially clarifies that these two newly created chambers are not proper judicial bodies as their members were appointed in flagrant breach of the national law applicable to judicial appointments. This is both unsurprising and warranted. What is more decisive and innovative is AG Tanchev’s first detailed analysis of the irregular nature of the two specific SC appointments in dispute. In this respect, AG Tanchev’s assessment is particularly but rightly scathing and reads like a quasi-impeachment case against Polish President Duda, who is found to have *manifestly* but also *deliberately* violated a freezing order of the Polish Supreme Administrative Court.⁴⁷⁸ AG Tanchev in particular emphasises that the individual in charge of examining WŻ’s appeal to CECPA was appointed by Duda ‘despite’ an appeal brought before the Supreme Administrative Court suspending these appointments. For the AG, this behaviour amounts to a twofold violation of the Polish Constitution and has demonstrated a ‘lack of respect for the principle of the rule of law’ which ‘constitutes per se an infringement by the executive branch of “fundamental rules forming an integral part of the establishment and functioning of that judicial system”’.⁴⁷⁹ One may note in this respect that Duda’s additional and deliberate violations of the Polish Constitution to enable the capture of the CT have also been authoritatively established by the European

⁴⁷⁷ AG Opinion in Case C-487/19, para. 22.

⁴⁷⁸ See e.g. AG Opinion in Case C-487/19, para. 85: ‘to my mind the referring court will be able to conclude that the act of appointment was adopted in *deliberate* breach of that order.’ (our emphasis)

⁴⁷⁹ Ibid, para. 65. See also para. 87: ‘The *manifest and deliberate character of the violation* of the order of the Supreme Administrative Court staying the execution of KRS Resolution No 331/2018, committed by such an important State authority as the President of the Republic, empowered to deliver the act of appointment to the post of judge of the Supreme Court, is *indicative of a flagrant breach* of the rules of national law governing the appointment procedure for judges’.

Court of Human Rights in its judgment of 7 May 2021 regarding the unlawful composition of the current CT.⁴⁸⁰

The conclusions to be drawn from the two Opinions of AG Tanchev leave no room for ambiguity: the individual who heard the action in Case C-487/19 cannot satisfy the requirements relating to the right of a tribunal established by law and may well be not a (lawful) judge at all, but the dispute does not require to decide whether his act of appointment is invalid per se as long as his decision can be set aside (although the Opinion leaves little doubt on this front); by contrast, the dispute in Case C-508/19 requires a direct answer on this aspect and for the AG, the answer must be that the individual's appointment to the infamous DC of the SC does 'not exist in law', which is however a finding for the referring court to make 'even where national law does not authorise to do so',⁴⁸¹ an implicit condemnation of the muzzle law here. It is worth stressing in this respect the AG's answer to the Polish authorities' claim that this would threaten the principle of the irremovability of judges:

national authorities may not take refuge behind arguments based on legal certainty and irremovability of judges. Those arguments are just a smokescreen and do not detract from the intention to disregard or breach the principles of the rule of law. It must be recalled that law does not arise from injustice (*ex iniuria ius non oritur*). If a person was appointed to such an important institution in the legal system of a Member State as is the Supreme Court of that State in a procedure which violated the principle of effective judicial protection, then he or she cannot be protected by the principles of legal certainty and irremovability of judges.⁴⁸²

Last but not least, these two EU cases are worth noting for their potential ECHR dimension. Indeed, were the Court of Justice to confirm in one way or another that the judicial appointment irregularities are more serious than the ones at

⁴⁸⁰ See *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718, paras 270, 279, 280 and 282: 'In the light of the two Constitutional Court judgments of December 2015, the Court finds that those acts and omissions of the President of the Republic should be regarded as a contravention of the domestic law in respect of the election process for Constitutional Court judges [...] the precipitate actions of the eighth-term *Sejm* and the President of the Republic, who were aware of the imminent decision of the Constitutional Court, raise doubts about irregular interference by those authorities in the election process for constitutional judges [...] The Court considers that the breaches of the fundamental rule were further compounded by two elements. Firstly, the eighth-term *Sejm* and the President of the Republic persisted in defying the finding initially made in the Constitutional Court's judgment of 3 December 2015 and later confirmed in the subsequent rulings [...] In the present case, the legislative and executive authorities failed to respect their duty to comply with the relevant judgments of the Constitutional Court, which determined the controversy relating to the election of judges of the Constitutional Court, and thus their actions were incompatible with the rule of law. Their failure in this respect further demonstrates their disregard for the principle of legality'.

⁴⁸¹ AG Opinion in Case C-508/19, para. 53.

⁴⁸² *Ibid.*, para. 54.

issue in *Ástráðsson v. Iceland*, as suggested by AG Tanchev,⁴⁸³ then hundreds of decisions issued or adopted with the participation of any of the individuals irregularly appointed to the SC could be challenged in Strasbourg. As a matter of fact, this may well become possible as soon as the Strasbourg Court's judgment in *Reczkowicz v. Poland* of 22 July 2021 becomes final. Indeed, due to the European Court of Human Rights' finding that the new NCJ, as re-established under the Amending Act on the NCJ of 8 December 2017, did not and still does not provide sufficient guarantees of independence from the legislative or executive powers, and the ensuing undue influence exercised by the legislative and executive powers regarding all judicial appointments since then,

the legal status of a large group of judges in Poland is now disputed [...] Formally, the *Reczkowicz* judgment concerns only the Disciplinary Chamber, and not all judges appointed upon the nomination of the reorganised NCJ. Moreover, the situation of all these judges is not identical. [...] It seems, however, that argumentation presented by the Court in the *Reczkowicz* judgment leaves little space for such differentiation. The ECtHR clearly linked the violation of the right to a tribunal established by law with the fact of appointment of judges upon the nomination of the reorganised NCJ. It even explicitly held that it was not necessary to examine other alleged irregularity invoked by the applicant. Therefore, if the mere fact that the judge was appointed upon the motion of the reorganised NCJ is sufficient to establish a violation of Article 6 of the Convention, it may be argued that the same violation occurs in the case of all other judges appointed in this way.⁴⁸⁴

Considering the number of increasing number of pending applications raising similar issues (*Reczkowicz* is one of a current total of 38 applications lodged against Poland in 2018–2021 concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017), one may expect legal chaos in Poland to continue to increase, especially if Polish authorities continue to refuse to promptly and fully comply with the rulings of both the Court of Justice and the European Court of Human Rights.

Failing Guardian

The Court's judgment in *AB* and the pending cases of *WŻ* and *MF* indirectly demonstrate the Commission's failure to do its job as Guardian of the Treaties. In addition to acting in a too little and too late fashion,⁴⁸⁵ the Commission appears to have decided to adopt the most narrow interpretation of the scope of application of the principle of judicial independence possible in rule of law-related preliminary ruling cases.

⁴⁸³ AG Opinion in Case C-487/19, para. 88.

⁴⁸⁴ M. Szwed, 'Hundreds of judges appointed in violation of the ECHR? The ECtHR's *Reczkowicz v. Poland* ruling and its consequences', *VerfBlog*, 29 July 2021: <<https://verfassungsblog.de/hundreds-of-judges-appointed-in-violation-of-the-echr/>>

⁴⁸⁵ Pech, Wachowiec and Mazur, 'Poland's Rule of Law Breakdown', op. cit.

In Case C-824/18, the Commission had essentially argued the opposite of what the Court of Justice eventually decided, by claiming inter alia that neither Article 19(1) TEU nor Article 267 TFEU would preclude the legislative amendments in dispute. For the Commission, EU law would only be violated in a situation where there is a ‘structural rupture in the [judicial] appointment process’.⁴⁸⁶ Similarly, in the pending cases of *WŻ* and *MF*, AG Tanchev was forced to criticise the ‘specious’ assessment of the Commission, which was oblivious to the ‘general context’ as regards the rule of law in Poland, and the total lack of effectiveness of the judicial remedy available to the plaintiffs.⁴⁸⁷ Indeed, the Commission went as far as to claim that the ‘right to a court established by law, under the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, does *not* [our emphasis] require that there always must be legal remedies against acts of judicial appointment and other acts adopted in procedures for the appointment of judges to Supreme Courts’.⁴⁸⁸ Viewed as a whole, it is difficult not to conclude that the Commission has decided to only offer *service minimum* when it comes to defending judicial independence.

This means inter alia avoiding difficult problems by pretending that they are not serious enough to warrant action or that they do not exist as the Commission did in another potentially significant pending case, Case C-132/20. This is a less well-known case which however deserves to be more widely known. Indeed, and to the best of our knowledge, this is the first ever national request for a preliminary ruling submitted by an individual appointed to the Supreme Court on the basis of an inherently deficient procedure as previously outlined.

Rather than mounting a strong defence of the view that the reference submitted by this individual is inadmissible, the Commission has failed to take a clear stance regarding the lack of independence of the referring individual, ignoring that his appointment was made inter alia in open disregard of a supreme court’s interim order. Similarly, the Commission did not raise any objection with respect to the ‘established by law’ criterion suggesting instead that the reference came from Poland’s Supreme Court and could therefore be presumed to come from a proper court.

This flawed logic must have delighted Poland’s autocratic government. Not only would this approach allow the current ruling party to ignore the case law of the ECJ regarding the review of judicial appointments marred by manifest procedural irregularities, it would also mean that individuals whose nominations to Poland’s SC were held to be invalid by Poland’s SAC could then seek to legitimise themselves by sending requests for a preliminary ruling heard and decided by the Court of Justice.

⁴⁸⁶ AG Opinion in Case C-824/18, EU:C:2020:1053, para. 40.

⁴⁸⁷ AG Opinion in Case C-487/19, para. 52 and Case C-508/19, para. 28.

⁴⁸⁸ AG Opinion in Case C-508/19, para. 27.

The depressing picture which emerges from the above is that we are currently in the worst of all possible worlds. First, the Commission continues to act in a too little too late fashion when it comes to defending judicial independence, with Case C-824/18 being a striking example of the measures the Commission ought to have targeted but did not. Second, the Commission appears keen to undermine national requests raising judicial independence issues submitted by independent judges under siege, by refusing to adopt a rule of law-enhancing interpretation of EU law and its scope, Case C-824/18 being a case in point. Third, the Commission has now refused to challenge robustly the admissibility of a preliminary ruling request submitted by one of the Polish ruling party's fake judges, who are now openly and actively colluding with the PiS-led executive to finish off judicial independence once and for all.⁴⁸⁹

In this respect, the proposal of AG Bobek in Case C-132/20⁴⁹⁰ would only make the situation worse in our opinion.⁴⁹¹ To put it briefly, based on the starting premise that the Article 267 procedure would establish judicial cooperation between courts and not between individual judges, benches or even chambers within national courts, AG Bobek suggests the following approach: (i) the ECJ should assess admissibility in light of the nature, position and functioning of the *overall* national referring court; (ii) a 'decoupling' when it comes to the application of the notions which Article 267 TFEU and Articles 19(1) TEU/47 CFR have in common, resulting e.g. in a different application of the concept of 'tribunal established by law' in situations governed by Article 267 TFEU from situations where Article 47 CFR applies as in 'the latter case, the examination of the lawfulness of the composition of the bench must naturally reach the level of individual cases'; (iii) provided that the overall court from which the preliminary ruling request originates has not been 'hijacked', the Court of Justice should find the request admissible.

Why is this, with respect, a flawed approach? In a nutshell, it would lead to situations where the Court of Justice would accept to answer questions from national referring bodies, which the ECJ would find 'established by law' for the purpose of Article 267 TFEU but whose judgments could subsequently be challenged on the ground *inter alia* that they were issued by a 'judge' or a bench irregularly composed in breach of the established by law requirement guaranteed under Article 47(2) CFR/Article 19(1) TEU (and Article 6(1) ECHR in any subsequent eventual complaint to Strasbourg). In other words, you could end

⁴⁸⁹ See most recently 'First President Of The Supreme Court Tries To Remove Judges Who Approached the CJEU', *Rule of Law in Poland*, 15 February 2021: <<https://ruleoflaw.pl/the-amendment-to-the-act-on-the-supreme-court-contains-dangerous-solutions/>>

⁴⁹⁰ Opinion of AG Bobek delivered on 8 July 2021, EU:C:2021:557.

⁴⁹¹ This analysis is based on L. Pech and S. Platon, 'How not to deal with Poland's fake judges' requests for a preliminary ruling: A critical analysis of AG Bobek's proposal in Case C-132/20', *VerfBlog*, 28 July 2021: <<https://verfassungsblog.de/how-not-to-deal-with-polands-fake-judges-requests-for-a-preliminary-ruling/>>

up with a body which is held by the ECJ to be enough of a ‘court’ to submit questions to it but not enough of a ‘court’ (due to e.g. not being established by law) to issue proper judgments as a matter of EU law and in particular, the principle of effective judicial protection. In addition, while AG Bobek argues that his approach would not lead to different meanings of the same principles such as established by law, in practice, we would end up with several definitions of the same principles rather than merely different types of examination or levels of scrutiny from the Court depending on the Treaty provision at play. With respect to his proposed new hijacking test, AG Bobek suggests looking at the accumulation of issues such as ‘appointments to that (formally judicial) institution, the political influence being exercised over its decision-making’ which ‘reveal a pattern in which there is no longer any independent court worth the name’. In doing so, AG Bobek reintroduces the issue of problematic judicial appointment into the mix. While this is an extremely complex area with no perfect solution available to the Court of Justice, it seems preferable to adopt a narrower and more pragmatic approach, i.e., to reject every preliminary ruling request originating from any of the individuals (some of whom were *never* judges to begin with) appointed in breach of the SAC’s freezing orders of 2018 previously described and whose nominations have already been found invalid by the same SAC in May 2021 on the ground that these individuals cannot be considered a tribunal established by law.

Non-regression principle

Most recently, the Court issued yet another seminal judgment. While formally about national judicial appointments in force in Malta, it cannot but be understood as a message to both the Commission and the Polish authorities.⁴⁹² To put it briefly, the Court for the first time explicitly drew from a joint reading of Articles 2 and 49 TEU a principle of non-regression,⁴⁹³ a step previously suggested to the Court by the EFTA Surveillance Authority in *AK*⁴⁹⁴ and a principle which implicitly guided the Court’s whole reasoning in *AB*:

63 It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a *reduction* [our emphasis] in the protection of the value of the rule of law, a value which is given

⁴⁹² Case C-896/19, *Repubblica v. Il-Prim Ministru*, EU:C:2021:31. For further analysis, see M. Leloup, D. Kochenov and A. Dimitrovs, ‘Non-Regression: Opening the Door to Solving the “Copenhagen Dilemma”? All Eyes on the Case C-896/19 *Repubblica v. Il-Prim Ministru*’ (2021) 46 *European Law Review* 687.

⁴⁹³ The non-regression principle is however not new in constitutional law, environmental law or international human rights law. See also the non-regression clauses in the EU–UK Trade and Cooperation Agreement (e.g. Article 6.2: ‘non-regression from levels of protection’).

⁴⁹⁴ See *supra* 4.1.

concrete expression by, inter alia, Article 19 TEU (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 108).

64 The Member States are thus required to ensure that, in the light of that value, *any regression* [our emphasis] of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary (see, by analogy, judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 40).

65 In that context, the Court has already held, in essence, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions relating to the organisation of justice which are such as to constitute *a reduction* [our emphasis], in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence (see, to that effect, 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, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153).

To put it differently, to respond to rule of law backsliding, the Court of Justice has explicitly established a non-backsliding principle which the Commission could rely upon to sue relevant backsliding national authorities. This will help inter alia address the autocrats' reliance on the Frankenstate-abusive comparative law argument,⁴⁹⁵ one of the favourite tactics for instance of the current Polish authorities. From now on, the Polish authorities will no longer be able to hide behind the argument that 'this and that legislation exists in another country' to which the Commission could then answer, 'it might well be the case but in your case it is a regression compared to the previous state of the legislation'.⁴⁹⁶

The significance and relevance of *Repubblika* to address the sustained attacks on judicial independence we have seen in Poland is therefore obvious and cannot indeed be overemphasised. A different outcome than the one in *Repubblika* could also be expected as in this instance, the Court was dealing inter alia with a situation where the guarantee of judicial independence had been reinforced in Malta, at least on paper, via the introduction of an *independent* Judicial Appointments Committee, while additional legal requirements further constrained the Prime Minister's judicial appointment power. By contrast, in *AB* the Court emphasised

⁴⁹⁵ K.L. Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26(4) *Governance* 559–562 (according to Professor Scheppele, Frankenstate is composed from various perfectly reasonable pieces drawn from different foreign legal systems, and its monstrous quality comes from the horrible way that those pieces interact when stitched together by autocrats).

⁴⁹⁶ We are grateful to Professor Platon for drawing our attention to this aspect of the Court's ruling.

for instance the fact that the ‘possibilities for obtaining judicial remedies which previously existed [were] suddenly eliminated’.⁴⁹⁷ This in our view amounts to a straightforward violation of the non-regression principle. The same can be said about the changes made to the composition and involvement of the NCJ, to the structure of the Supreme Court, to the rules governing the elections of the Supreme Court’s First President etc.

It is to be hoped that the Commission will get the message and act before it is too late, failing which the EU will end up not with merely one but two consolidated authoritarian regimes in its midst.⁴⁹⁸

⁴⁹⁷ Case C-824/18, para. 129.

⁴⁹⁸ V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, March 2020, p. 13: ‘The EU now has its first non-democratic Member State: Hungary is an electoral authoritarian regime and is the most extreme recent case of autocratization’.

7 Concluding overview: Completing the circle

The far-reaching developments in the area of the rule of law, which this casebook-style study has documented in detail, touch upon the very essence of EU constitutionalism and range from the renewed understanding of the role of the foundational values in the edifice of EU law to the further concretisation of the meaning of the rule of law and, specifically, of judicial independence, its scope of application and its enforcement at both national and EU levels. The multifaceted line of case law, which was prefigured by the Court's interim order in *Białowieża Forest*⁴⁹⁹ before being fully exposed in the Court's judgment in *Portuguese Judges*,⁵⁰⁰ has thus led to a deep renewal of the most essential features of EU's constitutionalism.

This renewal occurred through the articulation of a more substantive idea of the rule of law at the supranational level backed by the judicial 'activation' of the until then untapped potential of Article 19(1) TEU – an operationalisation of the EU principle of effective judicial protection fully justified and grounded in the Treaties – for the Court of Justice to intervene in defence of one of the core and well-established components of the rule of law: the principle of judicial independence. In addition to the emergence of fast-evolving clear standards of judicial independence binding on the Member States, these developments have resulted in upgrading the very nature of the judicial dialogue between the Court of Justice and the national courts.⁵⁰¹

The commonality of values and principles between the two levels of European judiciary is now not merely solemnly proclaimed, as it had been before.⁵⁰² In other words, the rule of law and its core components have become an enforceable part of EU law, paving the way to the progressive 'unification' of European judicial power on the basis of core justiciable principles binding and enforceable at both national and EU levels. This development, which was anticipated by

⁴⁹⁹ Case C-441/17 R *Commission v. Poland (Białowieża Forest)*, EU:C:2017:877.

⁵⁰⁰ Case C-64/16 *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

⁵⁰¹ M. Dawson, 'Constitutional Dialogue between Courts and Legislatures in the European Union' (2013) 19 EPL, 369; A. Arnulf, 'Judicial Dialogue in the European Union', in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford: OUP, 2012), 109; T. Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability', in A. Arnulf and D. Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: OUP, 2017), 403.

⁵⁰² D. Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?' in M. Adams, E. Hirsch Ballin, A. Meuwese (eds), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* (Cambridge: CUP, 2017), 425.

Judge Pescatore almost five decades ago,⁵⁰³ has thus become a lived reality of EU law at the theoretical and now also at the practical level. The same values and principles now directly guide not only the law (including both EU and national law) applied by the courts across the EU, but also constrain national authorities if they seek to ‘reform’ – read undermine – the fundamental elements underlying the organisation of national judiciaries, which earlier principles of equivalence and effectiveness did not tackle. The build-up and organisation of the national judicial systems is no longer immune to the substantive reach of EU legal principles and standards, thus turning the rule of law and related values into crucial parts of the *acquis*.⁵⁰⁴ The mere proclamation of compliance is thus no longer sufficient: the values enshrined in Article 2 TEU have thus acquired clear and enforceable legal value which can be used to challenge national and supranational measures.⁵⁰⁵

The circle of protection which the Court first started in *Portuguese Judges* has been completed in the recent *Repubblika* case.⁵⁰⁶ In what is yet another seminal judgment, the Court has made explicit the previously implied principle of non-regression. In doing so, the Court has further opened up the possibilities of supranational review of the Member State-level compliance with values which had previously commonly been regarded as largely non-justiciable, especially in relation to the national regulatory realm. While non-regression is for now only connected to the foundational value of the rule of law, this approach could and should also cover the other values laid down in Article 2 TEU, including the plenitude of its elements beyond rule of law as such,⁵⁰⁷ thus broadening the reach of EU law to a significant degree. Indeed, the focus on non-regression could be very effective in allowing for a move beyond judicial independence to help countering rule of law and democracy backsliding in EU Member States through legal means. It will now be for the Commission to make the most of the

⁵⁰³ Editorial Comments, ‘EU Law between Common Values and Collective Feelings’ (2018) 55 *Common Market Law Review* 1329, at 1332. See also P. Pescatore, *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (Sijthoff, 1974), 100.

⁵⁰⁴ D. Kochenov, ‘The *Acquis* and Its Principles: The Enforcement of ‘Law’ versus the Enforcement of ‘Values’ in the European Union’, in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 8.

⁵⁰⁵ L.S. Rossi, ‘La valeur juridique des valeurs: L’article 2 TEU’ (2020) 3 *Revue trimestrielle de droit européen*; T. von Danwitz, ‘Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ’ (2018) 21 *Potchefstroom Electronic Law Journal* 2; Kochenov, ‘The *Acquis* and Its Principles’, op. cit.

⁵⁰⁶ Case C-896/19 *Repubblika*, EU:C:2021:311.

⁵⁰⁷ M. Klamert and D. Kochenov, ‘Article 2 TEU’, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford: OUP, 2019), 22. The inability of the *Portuguese Judges* case-law to reach beyond a particular set of sub-elements of the rule of law has been criticised: K.L. Scheppel, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, after All’ (2020) 39 *Yearbook of European Law* 3.

principle of non-regression to more effectively prevent any kind of regression in terms of Article 2 TEU standards in any Member State.⁵⁰⁸

Building upon the largely chronological overview of the crucial case law reshaping the meaning, reach and functions of the principle of the rule of law in the EU and national legal systems, in this conclusion we prioritise the focus on three core implications of the Court's contribution to the fight against rule of law backsliding. We thus offer a transversal look at the case law that has initiated a far-reaching strengthening of EU constitutionalism. The triad we focus on includes the following building blocks: (1) the most significant components of the deep transformation triggered by the Court and which paved the way towards the ongoing transformation of the role played by the rule of law and, in particular, by the principle of judicial independence in the context of EU constitutionalism; (2) the most significant blind spots identifiable in the Court's rule of law case law to date; and (3) placing the Court's case law in the context of the politics of backsliding and regime change, connecting our legal analysis with socio-legal perspectives on populism and autocratic legalism.⁵⁰⁹

In discussing these issues, it is important to realise that the difficulties in tackling the rule of law and democracy backsliding problems in multi-level systems of governance is not a phenomenon which is specific to the EU, as Daniel Kelemen has demonstrated using the US as an example. The EU is therefore not unique in this respect.⁵¹⁰ While the Court, through the multiple judgments and orders reviewed in this study, has made a crucial contribution to the defence of judicial independence against authoritarian authorities, the ability of the supranational judiciary to emerge as an actor of true change in backsliding countries remains as uncertain as ever. Consequently, it is apparent that the fact that the Court has joined other international and supranational bodies around the world in co-shaping of national-level judiciaries⁵¹¹ does not necessarily mean *per se* that rule of law backsliding will be quickly and easily brought under control. Indeed, we need to remain mindful of the limitations of the effectiveness of judicial interventions in the context of autocratic legalism and rule of law backsliding.⁵¹²

⁵⁰⁸ M. Leloup, D. Kochenov and A. Dimitrov, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 *Repubblica v Il-Prim Ministru*' (2021) 46 *European Law Review* 687.

⁵⁰⁹ P. Blokker, 'Building Democracy by Legal Means? The Contestation of Human Rights and Constitutionalism in East-Central Europe' (2020) *Journal of Modern European History*; D. Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56 *Common Market Law Review* 623; P. Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) 15 *European Constitutional Law Review* 518; K.L. Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

⁵¹⁰ R.D. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52 *Government and Opposition* 211.

⁵¹¹ D. Kosař and L. Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109(4) *American Journal of International Law* 714.

⁵¹² Scheppele, 'Autocratic Legalism' *op. cit.*

The whole palette of legal developments presented in this casebook study, including the Court's many achievements, should thus be viewed *cum grano salis*: the ability of the law and of the judicial power to change the situation on the ground in a radical fashion appears to be limited where populism reigns.⁵¹³ It is thus indispensable to realise that changes on the ground in Poland and Hungary should not and could not be the only measures of success of the recent case law. Indeed, the legal transformations, which we have witnessed since the *Portuguese Judges* case, are crucially meaningful of themselves, in terms of strengthening the system of EU constitutionalism and making clear that the rule of law constrains national authorities even in areas where EU harmonisation is precluded. In doing so, the Court of Justice has positively reinforced the 'values dimension' of the EU, which now complements the internal market dimension of the EU construct.⁵¹⁴ The recent developments in the rule of law and judicial independence case law and the recalibration of the division of powers stemming from the new reading of Article 19(1) TEU will remain, independently of whether the post-*Portuguese judges* case law will enable the successful taming of the autocratisation process which first started in Hungary as far as the EU is concerned. And the long-term implications of these developments in recalibrating EU constitutionalism should prove as significant, if not more so, than their short-term impact.⁵¹⁵

7.1 Key features of the Court of Justice's rule of law enhancing line of case-law

The case law of the last three years has offered a crucially important bridge between reality and earlier expectations. The Court of Justice has successfully solved at least four very complex problems by turning the proclamation-based rule of law as a presumed foundational and shared value into an enforceable substantive principle of law, spanning both the EU and national legal orders. Although adherence to the rule of law has always been identified if not loudly praised as an essential feature of EU constitutionalism – of the EU's DNA, to borrow from Frans Timmermans⁵¹⁶ – the Union possessed, so it seemed, no legal basis to directly sue a Member State on this ground in a situation where serious rule of law backsliding was occurring post accession.⁵¹⁷ And of course, there is nothing like the US National Guard in the EU to enforce the rule of law in

⁵¹³ N. Lacey, 'Populism and the Rule of Law' (2019) 15 *Annual Review of Law and Social Science* 79.

⁵¹⁴ For more on the role of values in the structuring of EU federalism, see D. Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge University Press, 2017).

⁵¹⁵ D. Kochenov, 'De Facto Power Grab in Context: Upgrading Rule of Law in Populist Times' (2021) XL *Polish Yearbook of International Law* 197.

⁵¹⁶ 'The rule of law is part of Europe's DNA, it's part of where we come from and where we need to go. It makes us what we are.' F. Timmermans, 'The European Union and the Rule of Law', Keynote speech at Conference on the Rule of Law, Tilburg University, 1 September 2015 (on file with the authors).

⁵¹⁷ See however C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing the Rule of Law Oversight in the European Union' (2014) *EUI RSCAS Research Paper* 2014/25.

recalcitrant Member States.⁵¹⁸ To avoid any possible confusion, it is necessary to clarify that the much-quoted Article 7 TEU does *not* provide for an ordinary legal way to routinely address issues related to values backsliding, but it is supposed to be an exceptional tool unlikely ever to result in actual sanctions. Indeed, what is the likelihood of any meaningful politico-legal sanctions being levelled against a particular Member State, however actively it transforms itself into a kleptocratic autocracy in the context of the EU's internal market, where any adverse economic effects of such sanctions would likely be felt across the Union?⁵¹⁹ We shall soon see if the EU's new conditionality rule of law regulation will fare differently. Be that as it may, the purely legal articulation of Article 2 TEU values as actionable tools for safeguarding democracy and the rule of law in troubled Member States was equally unclear: the *acquis* has traditionally *presumed* the adherence of all the Member States to the values, rather than concern itself with ways to ensure prompt and effective compliance in situations of backsliding or regression, to use the Court of Justice's preferred expression.⁵²⁰

This is the context where the Court stepped in: it operationalised existing Treaty provisions such as Article 19(1) TEU to solve a previously unthinkable problem such as a rule of law backsliding and make it more difficult for the European Commission and the Council of Europe to stop fulfilling their Treaty mandate to uphold and promote the EU's foundational values by pretending that they lacked the authority and/or tools to do so.⁵²¹ The rule of law crisis has to some extent precipitated a development that was bound to happen. In other words, the jurisdiction lacuna preventing the judicial deployment of values upon which the Union is said to be built had to be filled sooner or later, allowing the EU to graduate into a true constitutional system which can and does stand by its principles.⁵²² The case law beginning with the *Portuguese Judges* ruling has precisely allowed for this kind of much-awaited transformation.

The Court has managed, firstly, to turn the presumption of compliance with the rule of law into an enforceable promise backed by the necessary jurisdiction to intervene by tapping into the hitherto dormant potential of Article 19(1)

⁵¹⁸ M. Tushnet, 'Enforcement of National Law against Sub-National Units in the United States', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford: OUP, 2017).

⁵¹⁹ D. Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' (2018) 38 *Polish Yearbook of International Law* 166; L. Pech, 'From "Nuclear Option" to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date', *VerfBlog*, 13 November 2019, <https://verfassungsblog.de/from-nuclear-option-to-damp-squib/>.

⁵²⁰ D. Kochenov, 'The *Acquis* and Its Principles: The Enforcement of 'Law' versus the Enforcement of 'Values' in the European Union', in A. Jakab and D. Kochenov (eds) *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 8.

⁵²¹ For an introduction to this debate, see the special issue edited by D. Kochenov, A. Magen and L. Pech (eds), 'The Great Rule of Law Debate in the EU' (2016) 54 *Journal of Common Market Studies*, 1043–1259.

⁵²² A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies* 549.

TEU.⁵²³ Secondly, the Court of Justice has also articulated the core substantive elements of the supranational rule of law,⁵²⁴ which it had the competence to enforce, going beyond the circularity of the definition offered in *Les Verts*. In addition to establishing that the rule of law is acting in compliance with the law, it outlined the substantive core of the concept, starting with the importance of the independence of the judiciary.⁵²⁵ The Court has moved on, thirdly, to ensure that this newly-found substance for the rule of law which cuts across legal orders and is thus equally applicable at the supranational and at the national level, is effectively enforceable and that this enforcement includes ample possibilities for interim relief, including the interventions to reverse the structural changes made by the Member States in their systems of the judiciary and, crucially, the empowerment of the *national courts* of the Member States, with the help of EU law, to do the same.⁵²⁶ The Court's rule of law enhancing and most welcome case law, which has endowed the rule of law with substance and enforceability, has suffered, however, from a narrow approach to the core of the concept in question: indeed, the rule of law is so much more than judicial independence!⁵²⁷ While the substantive limitations of the case law reviewed in detail above can be easily explained by the competence trigger used by the Court – Article 19(1) TEU – the latest *Repubblika* case gives rise to expectations that the 'non-regression principle' made explicit in that case, may lead the Court to consolidate a more all-encompassing definition of the rule of law.

7.1.1 Jurisdiction

To enable the direct enforcement of the obligation to respect and maintain EU requirements relating to judicial independence in a national context, the Court of Justice needed a jurisdictional trigger. Article 19(1) TEU provided it by offering a bridge between national measures destroying the rule of law and the scope of application of EU law. First used in the *Portuguese Judges* case and further relied upon in the subsequent line of cases raising judicial independence issues, Article 19(1) TEU has enabled a swift evolution of EU legal federalism. Indeed, once it was made clear that all national measures targeting any national court fall within the broad purview of Article 19(1) TEU, quite a different picture of EU constitutionalism emerges, compared with the pre-2018 reality.

⁵²³ Case C-64/16 *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

⁵²⁴ See L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) *Jean Monnet Working Paper Series No. 4/2009* and more recently, R. Janse, *De renaissance van de Rechtsstaat* (Open Universiteit, 2018).

⁵²⁵ K. Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) 21 *German Law Journal* 29.

⁵²⁶ P. Wennerås, 'Saving a forest and the rule of law: Commission v. Poland. Case C-441/17 R, Commission v. Poland, Order of the Court (Grand Chamber) of 20 November 2017' (2019) 56 *Common Market Law Review* 541.

⁵²⁷ K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, 'EU Values Are Law, after All' (2020) 39 *Yearbook of European Law* 3.

The *Portuguese Judges* case allowed for a new way of approaching the Union: from a ‘declaratory’ rule of law system⁵²⁸ – where the adherence of the national authorities to this principle is merely a presumption and where potential rule of law conflict is centred on the supranational level, as seen, for instance, in *Les Verts* – the Union has evolved into a constitutional system where this presumption is gradually being replaced with a justiciable requirement for full adherence to this statement as a matter of fact. This brings with it the possibility to check whether the presumption held true combined with a possibility to police serious deviations *both* in the political *and* the legal context. Leaving aside the political context of Article 7 TEU, which has been analysed in the literature in detail, we focused on what has been the most important set of developments in EU law over the last several years: the articulation of the rule of law as an enforceable principle across the legal orders in the EU. Indeed, if only an actual – as opposed to a declaratory – rule of law system can lend its ‘constitutional’ characterisation some truth, the EU is only now becoming a constitutional rule of law-based system.

Portuguese Judges allowed the Court to kill two birds with one stone. First, the Court gave clear EU law substance to the value of the rule of law in Article 2 TEU, thus elevating the independence of the judiciary to a new level both in theory and in practice. Second, the Court found a way to articulate the EU law jurisdiction in the cases involving threats to judicial independence at the *national* level, *de facto* broadening the material scope of EU law to a significant extent. It goes without saying that such broadening, predicted, as we have shown, by eminent scholars of the past, from Judge Kakouris to John Usher,⁵²⁹ is rock-solid in terms of its legal grounding in the texts and the spirit of the Treaties.

7.1.2 Focus on judicial independence

Appealing to the independence of the judiciary, which is one of the least questioned crucial elements of the rule of law, to accomplish the transition from restating presumptions to ensuring compliance is a move of towering importance, especially considering its simplicity. As explained by President

⁵²⁸ D. Kochenov, ‘Declaratory Rule of Law: Self-Constitution through Unenforceable Promises’, in J. Přibáň (ed.), *The Self-Constitution of European Society beyond EU Politics, Law and Governance* (Abingdon: Routledge, 2016), 159.

⁵²⁹ J.A. Usher, ‘How limited is the jurisdiction of European Court of Justice?’, in J. Dine, S. Douglas-Scott, I. Persaud (eds), *Procedure and the European Court* (London: Chancery Law Publishing 1991), 77; J.A. Usher, ‘General Course: The Continuing Development of Law and Institutions’, in F. Emmert, *Collected Courses of the Academy of European Law* (1991) European Community Law. Vol II, Book 1 (The Hague: Martinus Nijhoff Publishers, 1992), 122; C.N. Kakouris, ‘La Cour de Justice des Communautés européennes comme cour constitutionnelle: trois observations’, in O. Due, M. Lutter, J. Schwarze (eds), *Festschrift für Ulrich Everling* (Baden Baden: Nomos, 1995), 629; C.N. Kakouris, ‘La Mission de la Cour de Justice des Communautés Européennes et l’ethos du Juge’ (1994) 4 *Revue des affaires européennes* 35. See also K. Lenaerts, ‘The Rule of Law and the Coherence of the Judicial System of the European Union’ (2007) 44 *Common Market Law Review* 1625; C. Closa, D. Kochenov and J.H.H. Weiler, ‘Reinforcing the Rule of Law Oversight in the European Union’, *EUI RSCAS Working Paper No.* 2014/25.

Lenaerts: ‘It follows that national courts or tribunals, within the meaning of Article 267 TFEU, are, first and foremost, called upon to protect effectively the rights that EU law confers on individuals, thereby providing them with “supranational justice” and upholding the rule of law within the EU’.⁵³⁰

The crucially important case law thus brought about seemingly nothing new. Indeed, all the elements it draws upon have been with us all along – from the ongoing dialogue between the national courts acting in their EU law capacity and the Court of Justice, to the need to ensure that individuals can fully draw on their ‘legal heritage’⁵³¹ of rights articulated at the supranational level. The same applies to the requirements of independence for any court or tribunal established by law, which had to be met since the days when the preliminary ruling procedure first started operating.⁵³² Indeed, and also in the light of Article 47 CFR as well as 6 ECHR: who would ever doubt the fundamental role of judicial independence in this context, apart from the current governments of Hungary and Poland?

It is their reshuffling, and further elaboration and concretisation in the light of the new interpretation of the requirements of Article 19(1) TEU, that played the crucial role here. Once the material scope of this provision was (rightly) interpreted as covering all national bodies which, as ‘courts or tribunals’ within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, a whole new environment was created for the Court to participate in shaping the supranational substance of the meaning of ‘judicial independence’ as well as promote adherence to it.

In practice, this took the form of both direct interventions – as in *Commission v. Poland (The Independence of Supreme Court)* where a complete restoration of the *status quo ante* was commendably requested by the Commission and ordered by the Court – and indirect interventions – as in *AK* where the Court instructed the Polish referring court to apply its judicial independence test to the body in dispute. This combination of the possibility of direct and indirect intervention, combined with the perception that testing the independence of a national court alongside general adherence to the letter and the spirit of Article 19(1) TEU is ‘nothing new’, is precisely the appeal and the strength of the remarkable case law the Court has carefully built on the back of its seminal ruling in *Portuguese Judges*.

⁵³⁰ K. Lenaerts, ‘Our Judicial Independence and the Quest for National, Supranational and Transnational Justice’, in G. Sevik, M.-J. Clifton, T. Haas, L. Lourenço and K. Schwiesow (eds), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Berlin: Springer, 2019), 155, at 158.

⁵³¹ Case 26/62 *van Gend en Loos* [1963] ECR 1.

⁵³² M. Broberg and N. Fenger, *Preliminary References to the Court of Justice of the European Union* (2nd ed. Oxford: OUP, 2014).

7.1.3 Enforcement and interim relief

Having seemingly learnt from previous failures to prevent the successful purge of the senior echelons of the Hungarian judiciary,⁵³³ the Commission and the Court of Justice finally and effectively used interim measures to prevent a purge of the Polish Supreme Court, which prevented irreparable damage before a ‘victory’ on the merits. As with many other cases of relevance, the starting point of the interim relief case law analysed above was seemingly disconnected from rule of law backsliding issues as such and concerned environmental protection. Yet rule of law scholars immediately understood the potential significant implications of an interim order which aimed to save a UNESCO-protected forest from the spruce beetle.⁵³⁴ Most importantly, the case law on interim relief can be viewed as an example to follow for the national courts when it comes to enforcing EU law. Indeed, they are empowered to grant interim relief to ensure that EU law rights are preserved and irreparable damage prevented, as President Lenaerts has also underlined in his extra-judicial writings.⁵³⁵

The Court’s new case law has therefore significantly reinforced interim relief in reaction to the attacks to the whole system of institutions as it brought about the requirement of *status quo ante* restoration: the reversal of the results of the prior attack on judicial independence. Such developments, combined with the traditional possibility to request the Court of Justice to impose financial sanctions under Article 260 TFEU to sanction sustained and deliberate failures to comply with previous judgments as we have seen in the *Białowieża Forest* case, have brought the system of remedies in EU law to a new level in terms of guaranteeing effective compliance with the principle of the rule of law. However, this revamped system of remedies remains at the mercy, sorry, of the discretion of a Commission which takes its role of Guardian of the Treaties seriously. Sadly, not only has the Commission persistently failed to *promptly* bring applications for interim measures, it has also ignored repeated violations of the Court of Justice’s order regarding Poland’s ‘Disciplinary Chamber’ after lodging such a

⁵³³ Case C-286/12 *Commission v. Hungary (Judicial Retirement Age)*, EU:C:2012:687. For further analysis, see D. Kochenov and P. Bárd, ‘The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU’ (2019) 1 *European Yearbook of Constitutional Law* 243.

⁵³⁴ P. Wennerås, ‘Saving a forest and the rule of law: Commission v. Poland. Case C-441/17 R, Commission v. Poland, Order of the Court (Grand Chamber) of 20 November 2017’ (2019) 56 *Common Market Law Review* 541.

⁵³⁵ K. Lenaerts, ‘Our Judicial Independence and the Quest for National, Supranational and Transnational Justice’, in G. Sevik, M.-J. Clifton, T. Haas, L. Lourenço and K. Schwiesow (eds), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher* (Berlin: Springer, 2019), 155, at 157 and the references cited therein.

request for interim measures with the Court of Justice.⁵³⁶ As noted by several professors,

When it comes to the deliberate and systemic dismantling of checks and balances in a Member State's constitutional order, *time is absolutely of the essence*. Autocrats always move in quickly to change the facts on the ground so as to present the EU with *faits accomplis* such as the unlawful appointment of individuals masquerading as judges and establishment of new bodies masquerading as courts. Unless the Commission is prepared to seek the removal of sitting “judges,” require the rehiring of suspended and fired formerly independent judges and demand the dismantling of existing “judicial” institutions, it must act before these changes become entrenched and before the Member State has the chance to complete its thorough destruction of the rule of law. Following the belated but positive decision of your Commission in finally applying for *interim measures* in respect of the ‘Disciplinary Chamber’, we had assumed the lesson has been learned that it is important to stop unlawful changes before they occur. It would seem we were wrong.⁵³⁷

All in all, the Court of Justice has helpfully made clear that interim measures can be decisively used to stop rule of law rot, but as always, there is nothing the Court can do if the Commission does not first request interim measures promptly but also of the appropriate scope. What is for instance the point of stopping a purge of a national supreme court if you do not put a provisional stop to what amounts to flagrantly unlawful appointments to the same court? The developments from *Białowieża Forest* to the most recent Court orders in relation to the ‘disciplinary chamber’ have been very swift. So swift, that the Commission appears to have had trouble digesting the relevant case law and its implications, considering its persistent failure to act promptly, meaningfully and in a systemic manner in the face of swift, radical and systemic attacks on judicial independence as we have seen in Poland. The Court’s case law now provides the Commission with all it needs for it to act decisively to defend judicial independence via infringement actions. Whether the Commission has the will to act is not sadly something the Court can however help with: the Court cannot seize itself.

⁵³⁶ See the letter to the President of the European Commission by four European association of judges (AEAJ; MEDEL; EAJ; Judges for Judges) dated 30 September 2020: ‘in complete disregard of ECJ solid jurisprudence and circumventing the interim order by pointing to an alleged loophole, the Disciplinary Chamber continues its activities ... the European Commission must act in a decisive way, in order to prevent the violation of ECJ orders and guarantee that the EU legal order is respected’. Letter available at <<https://www.iaj-uim.org/iuw/wp-content/uploads/2020/09/Statement-4-European-Associations-Sept-2020.pdf>>.

⁵³⁷ L. Pech, K.L. Scheppele and W. Sadurski, ‘Open Letter to the President of the European Commission regarding Poland’s “Muzzle Law”’, *VerfBlog*, 9 March 2020: <<https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law>>.

7.1.4 Non-regression

Moving beyond the slow implementation of the full palette of the new legal opportunities to intervene in the interest of the rule of law in the backsliding Member States, the central drawback of the three core developments described above was the relatively narrow focus on judicial independence, resulting in a markedly narrow understanding of the rule of law in the context of EU law – to say nothing of other values.⁵³⁸ Perusal of any foundational text on the rule of law leaves no doubt at all about the fact that rule of law encompasses other core components beyond the principle of judicial independence: it is an idea which is infinitely broader and more multifaceted. The reasons behind the markedly narrow reading of the rule of law adopted by the Court of Justice in pretty much all the case law discussed throughout this work are very clear. Once Article 19(1) TEU had been relied upon as a jurisdiction trigger, focusing on aspects of the rule of law (as well as on other values of Article 2 TEU) unrelated to the issues falling within the ambit of Article 19(1) TEU became exceedingly difficult. This created a risk of focusing almost exclusively on judicial independence at the expense of the bigger picture and leaving unsanctioned other systemic violations of Article 2 TEU values.

This problem could soon be one of the past. In *Repubblika*, which concerned the constitutional appointment procedures of the Maltese judiciary, the Court has opened the door to defending EU values using of the principle of non-regression, a principle previously reserved to areas such as environmental law and international human rights law. This new principle appears destined to play a crucial role in the future to address values backsliding at the national level. In a nutshell, ‘non-regression’ consists in the blanket prohibition of any national rules, including constitutional provisions, which could ‘constitute a reduction, in the state concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence’.⁵³⁹ The ‘non-regression’ principle is a new important direction in the notable fight for the EU rule of law which started with the operationalisation of Article 19(1) TEU in *Portuguese Judges*. Although formally connected with Article 19(1) TEU in *Repubblika*, it may be argued that the core rationale underlying it is not Article 19(1) TEU *per se*, which is of crucial importance and of a huge added value with an eye, precisely, to superseding Article 19(1) TEU’s naturally in-built limitations in the defence of EU values. Non-regression builds on the provision mandating that any Member State joining the EU is bound to safeguard fully the values of the Union as expressed in Article 2. Non-regression may then be understood as the obligation not to fall below the Article 49 TEU threshold post-EU accession.⁵⁴⁰

⁵³⁸ K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, after All’ (2020) 39 *Yearbook of European Law* 3.

⁵³⁹ Case C-896/19 *Repubblika*, EU:C:2021:311, para. 65.

⁵⁴⁰ M. Leloup, D. Kochenov and A. Dimitrovs, ‘Non-Regression: Opening the Door to Solving the “Copenhagen Dilemma”? All Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*’ (2021) 46 *European Law Review* 687.

Not connecting non-regression exclusively with Article 19(1) is thus the crucial added value of *Repubblika*: what has been done by the Court of Justice under the banner of Article 19(1) TEU is but a micro-share of the potential of Article 49 TEU, as a marker of the starting standard, since Article 49 is not issue-specific and demands only one thing: full adherence to the values of Article 2 TEU at the moment of accession. Non-regression is thus the last promising chapter in the ongoing construction of a revamped values-based EU constitutional system.

7.2 Blind spots

The fundamental developments described above have however simultaneously led to the emergence of a number of blind spots. These blind spots have to some extent undermined the Court's commendable efforts to protect judicial independence in the face of deliberate and sustained attacks by autocratically minded national authorities. At least four such blind spots can be outlined: (1) the failure to ensure coherence by applying the same rule of law standards across different sub-fields of law; (2) the lack of attention paid to the fundamental requirement that a court must be 'established by law'; (3) the lack of results-oriented thinking in the application of the Charter; and (4) finally, the necessity to apply the same strict standards of judicial independence at the national *and* supranational levels.

7.2.1 Conflicting assessments across different sub-fields of law

The first issue in need of attention is the arguable lack of consistency across different sub-fields of law, generating potential tensions, if not incoherent outcomes. This problem is most visible in the case law related to the implementation of the EAWs issued by potentially non-independent judicial authorities in the Member States where whole judiciaries are under sustained attack and the highest courts already captured. The Court then most counter-intuitively assumes that a national judge can still operate fully independently in a system which is already systemically corrupted and structurally captured.⁵⁴¹ Moreover, the two-pronged rule of law test which flows from the *LM* case law is difficult to justify in the context of the much simpler and possibly more cogent approach taken by the Court of Justice in the *Prosecutors' cases*, where any systemic hint at the potential intervention of the executive disqualifies the national prosecutor acting in the capacity of the 'issuing judicial authority' for the purposes of the EAW outright, without any room for the individual assessment of the particular prosecutor involved to test independence.⁵⁴² The main assumption behind the *LM* test, that there should be a presumption that the issuing judicial authority is independent unless proven otherwise, in

⁵⁴¹ See Section 5.5 *supra* and the analysis offered in relation to Case C-216/18 *LM*.

⁵⁴² See Section 5.4 *supra* and the analysis offered in relation to Joined Cases C-508/18 *OG (Public Prosecutor's office of Lübeck)* and C-82/19 PPU *PI (Public Prosecutor's office of Zwickau)* and Case C-509/18 *PF (Prosecutor General of Lithuania)*.

the context of a captured judicial system, thus does not find any parallel in the *Prosecutors' cases*, where a finding of a lack of structural independence within the system makes the issue of whether the *concrete* prosecutor is independent redundant. Importantly, the same approach is embraced by the Court in *Banco de Santander SA*:⁵⁴³ the test of judicial independence in the context of submitting preliminary references under Article 267 TFEU is thus potentially more rigorous than in the cases where the *fundamental* rights of EAW suspects are directly in question, as we have seen in *LM*. This difference in the level of independence required, especially in the context of the all-encompassing significance of Article 19(1) TEU for all the judiciaries of the Union, is extremely difficult to grasp or justify. What makes the *LM* test unusable if not absurd is that the EAW-issuing judicial authority located as part of a structurally compromised judiciary is also expected to confirm its independence in the context of the dialogue with the executing judicial authority that the Court of Justice has mandated.⁵⁴⁴ Moreover, as we have seen in the case of Poland, any judge confirming that he or she is no longer able to operate independently in this context will put his or her professional career at risk. In agreement with Renata Uitz, one cannot dialogue a way out of rule of law backsliding,⁵⁴⁵ and making the fundamental right to a fair trial directly dependent on the outcome of a dialogue between the captured judge and a judicial authority in a different Member State seems particularly flawed and contrary to what EU primary law demands.

The reason behind the choice of such a counterproductive approach seems to primarily derive from the Court's unwillingness to accept that mutual trust cannot coexist with systemic deficiencies in the rule of law and more generally, to depart from its traditional approach – which has consisted in enforcing mutual trust between the Member States backed by the *presumption of compliance* of all the Member States with the values on which the EU is founded – and moving on to the fullest possible extent to questioning this presumption in the name of the enforcement of the rule of law principle. To quote Armin von Bogdandy, 'analysing the current Union in terms of trust is unsettling, as it fortifies the impression of a deep crisis with no evident solution'.⁵⁴⁶ The Court's rethinking of the role of Article 19(1) TEU in this context, coupled with the potentially more far-reaching and effective non-regression principle introduced in *Repubblika*, offers a radically new framing for the transition from trust to substantive rule of law. This transition should obviously concern all fields of law, not only judicial

⁵⁴³ See Section 5.1 *supra*.

⁵⁴⁴ P. Bárd and J. Morijn, 'Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU', *VerfBlog*, 19 April 2020: <<https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>>.

⁵⁴⁵ R. Uitz, 'Guest Editorial: The Perils of Defending the Rule of Law through Dialogue' (2019) 15 *European Constitutional Law Review* 1.

⁵⁴⁶ A. von Bogdandy, 'Ways to Frame the European Rule of Law' (2018) 14 *European Constitutional Law Review* 675, 695.

independence *sensu stricto*. Unless this becomes the case, establishing effective compliance with the rule of law in the EU will remain exceedingly difficult.⁵⁴⁷

The *Achmea* case and the Court's fight against intra-EU BITs⁵⁴⁸ demonstrates the strength of the rhetorical desire in *Kirchberg* to promote and defend the judicial dialogue (which the tribunals under the BITs were deemed incapable of). This, in practice, has resulted in lower levels of protection for investors everywhere in the EU and no protection at all in the countries where tribunals invalidated by the Court of Justice are the only guarantors of justice in a context where the judiciary has been captured and the rule of law destroyed. While the Court clearly sees the problem of the attacks on the independence of the judiciary in some Member States with clarity in the context of its rule of law case law, it has consistently failed to transfer its knowledge of the systemic deficiencies in the rule of law in countries such as Poland to other fields of law, especially when a potential solidification of its own position *vis-à-vis* other judicial actors was at stake.⁵⁴⁹

To avoid more *Achmea* and *LM*-like cases, the Court needs to adopt a more systemic approach and avoid sub-field-specific interpretations and solutions which do not take full account of the Court's findings in its main judicial independence line of cases. Should this not be done, the whole edifice of enforceable rule of law may come under threat: both *Achmea* and *LM* fail in this respect to meaningfully protect the rule of law notwithstanding proclamations to the contrary, by failing to take the autocratic reality on the ground into account and ending up sacrificing this principle in the name of the already departed 'mutual trust' and the supremacy of EU law.⁵⁵⁰ 'Smokescreen' comes to mind here, since without the rule of law there is no supremacy of EU law to talk about, as investors in Hungary and Poland have been quick to discover. All in all, the EU is going through a deep process of rethinking the idea of judicial independence and this rethinking does *not* only concern the Member States experiencing rule of law or democratic backsliding. Instead, judicial independence emerges as a general principle applying equally throughout the EU.

⁵⁴⁷ D. Kochenov, 'The *Acquis* and Its Principles: The Enforcement of 'Law' versus the Enforcement of 'Values' in the European Union', in A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: OUP, 2017), 8.

⁵⁴⁸ See Section 5.3 *supra* and the analysis offered in relation to Case C-284/16 *Achmea*.

⁵⁴⁹ D. Kochenov, 'De Facto Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times' (2021) XL *Polish Yearbook of European Law* 197.

⁵⁵⁰ For further discussion, D. Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?', in M. Adams, A. Meuwese and E. Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge: CUP, 2017), 419.

7.2.2 Lack of sufficient attention paid to the ‘established by law’ requirement

A second shortcoming of the Court’s rule of law case law to date, due in part to the Commission’s failure to challenge on this ground the captured or fake judicial courts illegally established in Poland,⁵⁵¹ is the insufficient attention paid to the crucially important requirement of ‘established by law’, which all courts in rule of law-based democracies ought to be expected to meet.⁵⁵² Not addressing the issue of whether a court is composed, fully or in part, of manifestly illegally appointed members, to exclusively focus instead on judicial independence and impartiality, may unnecessarily complicate matters and allow for the internal gangrening of national judicial systems and the proliferation of what may be informally labelled ‘fake judges’, who in turn, are bound to seek to increasingly corrupt the EU system via the preliminary ruling mechanism.

Paying more attention to the *fundamental* right to a tribunal *established by law*, arguably the most basic requirement flowing from the principle of the rule of law, could supply an additional pillar to the EU’s substantive approach to the rule of law, which is currently articulated mostly through the principles of judicial independence and the irremovability of judges. Such an approach would also add coherence to the case law on the tightening of the criterion of the independence of the bodies to be regarded as courts in the context of Article 267 TFEU.⁵⁵³ Indeed, ‘established by law’ should emerge as the *starting point* of any assessment of the Member States’ judiciaries when it comes to assessing their compliance with the rule of law. This observation is of crucial relevance in the context of the totality of EU law and should thus apply to all institutions. The Commission must urgently do better in this respect as it is for now not even legally responding to the *de facto* or *de jure* nullification of ECJ rulings by unlawfully composed ‘not established by law’ bodies masquerading as courts.

⁵⁵¹ The European Court of Human Rights has at last stepped in to make this clear in relation to the unlawfully composed ‘Constitutional Tribunal’ of Poland: See judgment of 7 May 2021, *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718: The bench which heard the case regarding the applicant included an individual unlawfully elected to the Constitutional Tribunal on the back of repeated illegal actions by the Polish President and the then Polish Prime Minister. As a result, the bench which tried this case was not a tribunal established by law and thus in violation of Article 6(1) ECHR. One may expect the Strasbourg Court to rule in a similar fashion in relation to the ‘Supreme Court’ of Poland which has also become unlawfully composed: See pending case of *Advance Pharma sp. z o.o. v. Poland* (no. 1469/20). For further analysis, see M. Szwed, ‘What Should and What Will Happen After Xero Flor: The judgement of the ECtHR on the composition of the Polish Constitutional Tribunal’, *VerfBlog*, 9 May 2021, <<https://verfassungsblog.de/what-should-and-what-will-happen-after-xero-flor>>; M. Leloup, ‘The ECtHR Steps into the Ring: The Xero Flor ruling as the ECtHR’s first step in fighting rule of law backsliding’, *VerfBlog*, 10 May 2021, <<https://verfassungsblog.de/the-ecthr-steps-into-the-ring>>; B. Grabowska-Moroz, ‘Strasbourg Court Entered the Rule of Law Battlefield’, *Strasbourg Observers*, 13 September 2021. For the unlawful response from the unlawfully composed Constitutional Tribunal, see R. Lawson, ‘“Non-Existent”: The Polish Constitutional Tribunal in a state of denial of the ECtHR Xero Flor judgment’, *VerfBlog*, 18 June 2021: <<https://verfassungsblog.de/non-existent/>>

⁵⁵² See Section 6 *supra*.

⁵⁵³ See Section 5.1 *supra*.

This is as dangerous as it is irresponsible as these kangaroo courts and their fake judges are not only used to end judicial independence once and for all in a specific country, they also directly threaten the whole EU legal order. Months and months of inaction in the face of institutionalised harassment of Polish judges by the so-called ‘Disciplinary Chamber’ of the Supreme Court, which has been repeatedly found not to constitute even a court within the meaning of both Polish and EU law, is a particularly depressing saga of repeated dereliction of duties from the Guardian of the Treaties.

It is to be hoped that the European Commission will in particular wake up and act against the unlawfully composed ‘Constitutional Tribunal’ of Poland now that the European Court of Human Rights has formally confirmed this illegal composition on the back of the manifestly irregular appointments made to it by the current Polish authorities. We should stress in this respect that the European Court of Human Rights did so with reference to the European Commission’s own assessment in its Article 7(1) TEU proposal which was however and incomprehensibly not followed through with a single infringement action targeting the unlawfully composed ‘Constitutional Tribunal’:

A number of other international bodies, among them the Human Rights Committee, the UN Special Rapporteur on the Independence of Judges and Lawyers, the Council of Europe Commissioner for Human Rights, the Parliamentary Assembly of the Council of Europe and the European Commission, also urged the Polish authorities to fully implement the Constitutional Court’s judgments regarding the election of constitutional judges, in particular those of 3 and 9 December 2015. In this connection, the European Commission noted in its Reasoned Proposal in Accordance with Article 7 § 1 of the TEU that the three judges who had been lawfully nominated in October 2015 by the previous legislature had still not been able to take up their judicial duties at the Constitutional Court, while the three judges nominated by the eighth-term *Sejm*, in the absence of a valid legal basis, had been admitted by the acting President of the court to take up their judicial duties.

[...]

Having regard to the above, the Court considers that the actions of the legislature and the executive amounted to unlawful external influence on the Constitutional Court. It finds that the breaches in the procedure for electing three judges, including Judge M.M., to the Constitutional Court on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a “tribunal established by law”.⁵⁵⁴

⁵⁵⁴ *Xero Flor w Polsce sp. z o.o. v. Poland*, op. cit., paras 284 and 287 (cross-referencing omitted from excerpt).

With the Court of Human Rights having most emphatically ruled that having questionably appointed members on a bench definitely disqualifies national courts from meeting the basic Article 6 ECHR criterion of a ‘tribunal established by law’, it is imperative that the Commission and the Court stop ignoring this structural reality. The ignorance of this vital aspect of the organisation of the judiciaries in the framing of the cases, which the Commission brings to the Court of Justice, has been criticised in the literature and is among the most obvious failures of the Commission as the Guardian of the Treaties since Poland’s rule of law crisis began in late 2015. It is deeply problematic that we have had to wait years and for a complaint to the Court of Human Rights to confirm the obvious: that the Polish Constitutional Tribunal is not lawfully composed.

In a situation where the EU hears such news from Strasbourg while the Commission does not launch any infringement procedure on this direct basis, notwithstanding the abundant clarity of the situation on the ground,⁵⁵⁵ it is difficult not to conclude that the Guardian of the Treaties is largely missing in action in the face of repeated constitutional hooliganism directly undermining the effectiveness of EU law in an EU Member State as a whole.⁵⁵⁶ We would therefore find it difficult to agree with the characterisation of the current state of deployment of the infringement proceedings as being one ‘of maturity’.⁵⁵⁷ Instead, we have seen a lack of legally sound results-oriented thinking coupled with what Scheppele, Kochenov and Grabowska-Moroz have characterised as a practice of ‘losing by winning’.⁵⁵⁸ In other words, while the Commission does win the infringement actions it brings to Court, it does so while totally ignoring the bigger picture of the ongoing assaults on the rule of law, which explains *inter alia* why Poland and Hungary became in 2020 the top two autocratising countries *in the world* using the past decade as a benchmark.⁵⁵⁹ This does not so much reflect maturity but a misplaced fear of losing a case, but what is the point of not losing a case when authoritarian regimes are consolidating in the meantime and threatening the whole EU legal order?

⁵⁵⁵ T.T. Konciewicz, ‘Of Institutions, Democracy, Constitutional Self-Defence, and the Rule of Law’ (2016) 53 *Common Market Law Review* 1753; T.T. Konciewicz, ‘The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux’ (2018) 43 *Review of Central and East European Law* 116; W. Sadurski, *Poland’s Constitutional Breakdown* (Oxford: OUP, 2019).

⁵⁵⁶ See, more generally, P. Castillo-Ortiz, ‘The Illiberal Abuse of Constitutional Courts’ (2019) 15 *European Constitutional Law Review* 48.

⁵⁵⁷ L. Prete and B. Smulders, ‘The Age of Maturity of Infringement Proceedings’ (2021) 58 *Common Market Law Review* 285.

⁵⁵⁸ K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, ‘EU Values Are Law, after All’ (2020) 39 *Yearbook of European Law* 3.

⁵⁵⁹ See V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021.

7.2.3 Insufficient result-oriented use of the Charter

The third problem we could flag is the insufficient attention paid by the Court to the productive potential of the Charter of Fundamental Rights of the EU,⁵⁶⁰ which has only been used as a ‘sidekick’ for Article 19(1) TEU (due, strictly speaking, to the Court’s reading of the Charter provision which governs its scope of application)⁵⁶¹ or as a self-standing set of standards for the national courts to consider when the Court of Justice is not inclined to intervene directly. The Charter deserves much more serious consideration to ensure that the standards of the independence of the judiciary in the EU do not fall below the minimum standards laid down in the case law of the European Court of Human Rights. We should stress however that the Charter was deployed appropriately in the *AK* case, where the Court relied on Article 47 CFR to provide the Polish Supreme Court with a crystal clear set of criteria to be deployed in the context of the assessment of the independence of the disciplinary chamber of the Supreme Court.⁵⁶² The need for the Charter standards consisted precisely in making the life of the Polish Supreme Court easier by outlawing the now infamous and discredited ‘Disciplinary Chamber’.

The alternative would be, of course, the direct application of the Charter by the Court of Justice itself, just as it applied Article 19(1) TFEU in other seminal cases involving the Polish government’s attacks on the rule of law. The choice of the mode of action is of fundamental importance, of course, both in terms of its perceived legitimacy *and* in terms of the effectiveness of the intervention. Having chosen to delegate the actual application of the Charter standards to the national court, a practice formally justified by the limits of the Court’s jurisdiction in preliminary cases, instead of providing a much more explicit and rigid interpretation leaving no room for doubt as to what the only possible answer is as a matter of EU law – which had hitherto been the standard way of reading the meaning of ‘interpretation’ by the Court of Justice for decades – the Court presumably hoped to increase the legitimacy of the verdict of the Polish Supreme Court against the phoney chamber. The rationale behind such thinking is unclear, as it has only led to more widespread unashamed

⁵⁶⁰ D. Kochenov and J. Morijn, ‘Le rôle de la Charte dans la lutte pour l’État de droit au sein de l’Union européenne’ in A. Iliopoulou-Penot and L. Xenou (eds), *La Charte des droits fondamentaux, source de renouveau constitutionnel européen?* (Brussels: Larcier, 2020). For a slightly updated version of the argument, see, D. Kochenov and J. Morijn, ‘Augmenting the Charter’s Role in the Fight for the Rule of Law in the European Union: The Cases of Judicial Independence and Party Financing’, 27 *European Public Law* 2021 (forthcoming).

⁵⁶¹ As recently reiterated by the Court of Justice, Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection and enshrines the right to an effective remedy, can only be relied upon in a situation where the person invoking the right is relying on rights or freedoms guaranteed by EU law. If national disputes do not concern the recognition of a right conferred on the parties under a provision of EU law, Article 47 will not be deemed applicable. See Section 6 *supra* and the analysis in relation to Case C-824/18 *AB et al.* (*Appointment of judges to the Supreme Court – Actions*)

⁵⁶² See Section 4.1 *supra*.

harassment, including via the initiation of the Putin-inspired absurd criminal charges against independent Polish judges.

The Court of Justice must be more mindful that by the time its preliminary rulings need to be applied to the disputes at hand, there may well be no independent judges left to apply them. What we have witnessed, in other words, is a deepening of the conflict instead of a resolution to the crisis. Preferring ‘legitimacy’ in the deployment of the Charter standards through instructing the Supreme Court to apply the European Court of Justice’s standards to the particular case of the phoney ‘Disciplinary Chamber’ has killed off the effectiveness of the legal intervention altogether.

7.2.4 Applying the same standards at the national and supranational levels

The difficulty of applying the principle of the rule of law consistently across the levels of the multi-layered legal systems has been mentioned in the literature.⁵⁶³ The last problem we wish to flag is directly related to this issue. It consists in the towering necessity to apply the strict rule of law standards flowing from the latest case law equally to the courts at the Member State level *and* the supranational courts, including the Court of Justice itself. The case of AG Sharpston demonstrates with clarity that there might be a gap emerging here,⁵⁶⁴ to say nothing about the basic understanding of the meaning of the supranational rule of law post-Opinion 2/13.⁵⁶⁵ The EU cannot be a site of *two* types of rule of law applied side-by-side, as this would undermine the legitimacy of the whole exercise of defending the rule of law throughout the EU at all levels.

Crucial in this regard is to see the full implications of the ‘established by law’ criterion in relation to the Court of Justice itself. If the Polish Constitutional Tribunal is not lawfully composed, as confirmed by the European Court of Human Rights, because one of the judges was irregularly appointed to a position

⁵⁶³ G. Palombella, ‘Beyond Legality—before Democracy: Rule of Law Caveats in the EU Two-Level System’, in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016).

⁵⁶⁴ See Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v. Sharpston*, EU:C:2020:700; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v. Sharpston*, EU:C:2020:705; Case T-550/20 *Order of the Judge Hearing Applications for Interim Measures in Sharpston v. Council and Representatives of the Governments of the Member States* EU:T:2020:416; Case T-180/20 *Sharpston v. Council and Representatives of the Governments of the Member States*, EU:T:2020:473; Case T-184/20 *Sharpston v. Court of Justice of the European Union*, EU:T:2020:474; Case T-550/20 *Sharpston v. Council and Representatives of the Governments of the Member States*, EU:T:2020:475. For a detailed analysis, see D. Kochenov and G. Butler, ‘The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution’ (2020) *Jean Monnet Working Paper No. 2/2020* (NYU Law School).

⁵⁶⁵ P. Eeckhout, ‘Opinion 2/13 on EU accession to the ECHR and judicial dialogue—autonomy or autarky?’ (2015) 38 *Fordham International Law Journal* 955.

which was not vacant,⁵⁶⁶ what to make of the appointment by the Member States of a new ‘Advocate General’ in full knowledge that the seat to which that person had been so appointed was not vacant?⁵⁶⁷ The finding of the Vice President of the Court of Justice that such an appointment cannot be reviewable under EU law does not make the composition of the Court of Justice after the non-reviewable questionable appointment necessarily lawful. In fact, the statement of non-reviewability only exacerbates the problem, since it hints at what we could describe as a weak spot in the *structural independence* of the Court of Justice *vis-à-vis* the Member States. It cannot be that a Spanish tax tribunal is not sufficiently independent even to ask the Court of Justice a preliminary question because its members could be dismissed by the executive before the expiration of their term of office,⁵⁶⁸ while the Court of Justice, where similar interference is apparently possible and cannot be legally reviewed,⁵⁶⁹ is fully independent measured by the same standard, in order to answer such a question.

In a way, this problem goes to the core of the understanding of the rule of law as developed by the Court of Justice. The editors of the *Common Market Law Review* might be right in their analysis of the fundamentals underlying *Portuguese Judges*.⁵⁷⁰ If the Court states that the very existence of effective judicial review designed to ensure compliance with EU law is part of the essence of the rule of law,⁵⁷¹ does that not imply a circular and unhelpful approach to the rule of law? ‘How can the mundane objective of “compliance with EU law” be constitutive of “the essence of the rule of law?”’⁵⁷² To make sure that the rule of law-enhancing case law of the Court, which began with *Portuguese Judges* is a success, the Court will need to think very hard, to be as convincing as possible in answering this question and any answer that does not presuppose that the same clear standards should be applicable at the national *and* at the supranational levels alike would unquestionably fail to convince. Clear, solid and workable standards consistently applied will be the key to success of the Court of Justice’s rule of law case-law in the long run – and a crucial legacy of the Lenaerts’ Court.

⁵⁶⁶ *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718.

⁵⁶⁷ D. Kochenov and G. Butler, ‘The Independence and Lawful Composition of the Court of Justice of the European Union’, *op. cit.* For an argument that the key question in this instance is whether Brexit, in light of the legal framework applicable to an EU AG, can be construed as a legitimate and compelling ground to justify the *premature* and *automatic* termination of AG Sharpston’s fixed judicial term, while also not breaching the principle of proportionality and a response to the negative, see L. Pech, ‘*The Schrödinger’s Advocate General*’, *VerfBlog*, 29 May 2020, <<https://verfassungsblog.de/the-schroedingers-advocate-general>>.

⁵⁶⁸ Case C-274/14 *Banco de Santander SA*, EU:C:2019:802.

⁵⁶⁹ Case C-423/20 P(R) *Order of the Vice-President of the Court in Council v Sharpston*, EU:C:2020:700; Case C-424/20 P(R) *Order of the Vice-President of the Court in Council and Representatives of the Governments of the Member States v Sharpston*, EU:C:2020:705.

⁵⁷⁰ Editorial Comments, ‘EU Law between Common Values and Collective Feelings’ (2018) 55 *Common Market Law Review* 1329, 1334.

⁵⁷¹ Case C-64/16 *ASJP*, para. 36.

⁵⁷² Editorial Comments, ‘EU Law between Common Values and Collective Feelings’, *op. cit.*, at 1334.

7.3 The Court of Justice's rule of law case-law in a broader context

The Court of Justice has joined the global trend of co-shaping domestic judicial design by international courts.⁵⁷³ The European Court of Human Rights has been playing a significant role in this sphere for years, especially as far as the aspects of judicial independence and self-governance are concerned. The Court of Justice could in fact be inspired by its Strasbourg *homologue* in framing the issue – even if the Strasbourg standards of judicial independence appear to go further than what the Court of Justice has articulated so far, especially given the strict Strasbourg rules on judicial self-governance⁵⁷⁴ and its strengthening of the requirements connected to the right to a tribunal established by law,⁵⁷⁵ which even encompasses the emerging notion of ‘internal judicial independence’,⁵⁷⁶ including the requirements for judges ‘to be free from directives of pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in a court’.⁵⁷⁷

In addition to the Court of Justice's strengthening efforts to neutralise Poland's ‘fake judges’, the Court's earlier efforts to neutralise Poland's ‘Disciplinary Chamber’ could be viewed as a forceful intervention in support, precisely, of internal judicial independence. The same applies to the requirement of independence and self-governance of the judicial councils.⁵⁷⁸ The two European supranational courts thus adjudicate in concert with mutually reinforcing lines of case law. The two legal requirements of ‘internal independence’ and ‘established by law’ share obvious connections. As the European Court of Human Rights put it in *Icelandic Judges*, there is a ‘common thread running through the institutional requirements of Article 6 § (1), in that they are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers’⁵⁷⁹ – and only their joint and proactive enforcement will prevent the proliferation of fake courts and fake judges within the EU legal order.

⁵⁷³ D. Kosař and L. Lixinski, ‘Domestic Judicial Design by International Human Rights Courts’ (2015) 109(4) *American Journal of International Law* 714. The same criticism could apply to international bodies engaged in the elaboration of ‘soft law’ standards which quickly solidify, guiding day-to-day practice. See also M. de Visser, ‘A Critical Assessment of the Rule of the Venice Commission in Processes of Domestic Constitutional Reform’ (2015) 63(4) *American Journal of Comparative Law* 963.

⁵⁷⁴ See e.g. *Denisov v. Ukraine*, no. 76639/11, 25 September 2018; *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013. For further analysis, see D. Kosař (ed.), ‘Judicial Self-Government in Europe’ (2018) 19 *German Law Journal* (special issue).

⁵⁷⁵ *Xero Flor w Polsce sp. z o.o. v. Poland*, CE:ECHR:2021:0507JUD000490718.

⁵⁷⁶ J. Sillen, ‘The Concept of “Internal Judicial Independence” in the Case Law of the European Court of Human Rights’ (2019) 15 *European Constitutional Law Review* 104.

⁵⁷⁷ *Parlov-Tkalčić v. Croatia*, no. 24810/06, 22 December 2009.

⁵⁷⁸ See e.g. *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013.

⁵⁷⁹ *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, para. 233.

There is one crucial general question which arises in this context.⁵⁸⁰ How much can courts actually do in the face of a rising tide of populism? This is where the EU, rather than the backsliding Member States, seems to be emerging as a winner from the rule of law crisis it is going through. Indeed, the rule of law turn in the Court of Justice's case law that we have documented is a very significant development in the overall history of EU law, which will have lasting consequences. The EU should emerge, at least we hope, as a healthier and more powerful polity as a result. Moreover, the Court of Justice's authority and legitimacy should also be strengthened as a result of its arguably rather lonely defence of judicial independence in a context where the Commission and the Council have proved unable to act promptly, effectively and coherently. The Court may be viewed in this context as 'the last soldier standing',⁵⁸¹ offering a new vision of constitutionalism to the Union which is unmistakably attractive: from the world of proclamations, the core values of the Union are moving to the realm of the law, turning the Union into a true constitutional system.

The same cannot be said, unfortunately, about the Member States experiencing the democratic and rule of law decline. Indeed, the Union can seemingly do very little on the ground, the rapidly evolving supranational rule of law case law notwithstanding. This has nothing to do with any particular set of Member States in question. 'Is something "wrong" with Central and Eastern Europe?',⁵⁸² while obviously relevant in the context of Hungary and Poland, is *not* the most important question to consider. What the EU needs and is mostly missing is the will to use promptly and implacably the set of legal-political tools it possesses to *prevent* backsliding in *any of its regions*. Presenting this necessity as region-specific is not persuasive.

Populism no longer seems to be the exception but rather the rule. In this context, the assaults on the rule of law are bound to intensify, since populism, which amounts to authoritarianism in practice, and the attacks on the rule of law share a consubstantial relationship.⁵⁸³ It thus appears that 'autocratic legalism' is here to stay and the EU needs effective tools to combat it, wherever and whenever backsliding occurs.⁵⁸⁴

⁵⁸⁰ See in particular D. Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries' (2019) 56 *Common Market Law Review* 623; A. Sajó, 'The Rule of Law as Legal Despotism: Concerned Remarks on the Use of "Rule of Law" in Illiberal Democracies' (2019) 11 *The Hague Journal on the Rule of Law* 371; M. Blauberg and R.D. Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24(3) *European Journal of Public Policy* 321; P. Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law', in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016), 249.

⁵⁸¹ Kochenov and Bárd, 'The Last Soldier Standing', *op cit*.

⁵⁸² J. Dawson and S. Hanley, 'What's Wrong with East-Central Europe? The Fading Mirage of the "Liberal Consensus"' (2016) 27 *Journal of Democracy* 21.

⁵⁸³ N. Lacey, 'Populism and the Rule of Law' (2019) 15 *Annual Review of Law and Social Science* 79.

⁵⁸⁴ K.L. Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

As the law stands today, while the EU has received a much-needed rule of law upgrade thanks to the Court of Justice, the practical consequences of this upgrade in the backsliding jurisdictions remain very limited to date. As Dariusz Adamski put it: courts ‘cannot preclude a social contract of democratic backsliding when a society concludes that an illiberal system is superior to its previously tried liberal alternatives’.⁵⁸⁵ We should however not forget that authoritarianism in the two EU countries subject to Article 7(1) TEU has been very much an elite-driven top-down process⁵⁸⁶ relying on structurally compromised electoral frameworks and environments which prevent any rotation of power.⁵⁸⁷

While supranational courts can on some occasions be much more effective than the supranational political institutions in bringing about tangible results, the bigger picture still remains quite grim, as the ‘populist’ forces are busy undoing not only judicial independence, but also essentially the idea of legality, and as long as important segments of the population will back these forces, the Court’s rule of law case law, however far-reaching, can only limit the damage, especially if political institutions fail to do their jobs. This towering problem has been outlined with particular clarity by David Kosař, Jiří Baroš and Pavel Dufek:

While the European Court of Justice surely plays an important role, especially in the current developments in Poland, the failure of the Pan-European template shows that a top-down approach to the separation of powers does not work in Central Europe and that any long-term solution must have the broad support of the people.⁵⁸⁸

Be it as it may, it can be hypothesised that such developments as the ones we have witnessed since *Portuguese Judges* could have occurred much earlier in the history of EU’s constitutionalism. Yet, there was probably no overwhelming need for their materialisation until democratic and rule of law backsliding

⁵⁸⁵ D. Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56 *Common Market Law Review* 623, 659. See also P. Blokker, ‘Building Democracy by Legal Means? The Contestation of Human Rights and Constitutionalism in East-Central Europe’ (2020) *Journal of Modern European History*; P. Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’ (2019) 15 *European Constitutional Law Review* 518

⁵⁸⁶ See e.g. H. Tworzecki, ‘Poland: A Case of Top-Down Polarization’ *ANNALS, AAPSS*, 681, January 2019, 97: ‘Democratic backsliding in Poland has been ‘a process driven from the top down by a segment of the political class that donned the cloak of radical populist anti-establishmentarianism to gain popular support, win an election, and rewrite the constitutional rules of the game to its own benefit’.

⁵⁸⁷ As recently and aptly summarised by Freedom House in its 2021 *Nations in Transit* report, p. 9: ‘it is unrealistic to expect that the leaders of hybrid or backsliding regimes will do anything to make it easier for voters to deliver electoral breakthroughs. Hungary’s ruling Fidesz party, for example, is constantly tinkering with the electoral framework to fortify its parliamentary supermajority’.

⁵⁸⁸ D. Kosař, J. Baroš and P. Dufek, ‘The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism’ (2019) 15 *European Constitutional Law Review* 427, 461.

started acquiring critical mass, following the start of Poland's rule of law crisis in late 2015. The presumption of compliance by all the Member State authorities with the rule of law⁵⁸⁹ had until then actually worked quite well.⁵⁹⁰ Should this process of backsliding or regression, to use the Court's expression, continue, it will become increasingly ridiculous to present and praise the EU as a club of democracies. This evolution, in turn, risks driving citizens in rule of law-abiding democracies to start to seriously question the very *raison d'être* of the EU.⁵⁹¹ The issue is thus not merely helping the Polish and the Hungarian people to remain free in rule of law based democracies and concerns the very preservation of the constitutional system in Europe.⁵⁹² The very rationale of the Union, the EU's DNA, as such is at stake.⁵⁹³ As recently and aptly observed by AG Bobek,

In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe.⁵⁹⁴

In the face of this existential danger, the Court of Justice has done a by far superior job to any other EU institution to make sure that the promise of Article 2 values is delivered on. In doing so, the Court of Justice must be commended for presiding over one of the most important developments in the law of the Union since its foundational jurisprudence of the early 1960s.

⁵⁸⁹ D. Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?', in M. Adams, A. Meuwese and E. Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge: CUP, 2017), 419.

⁵⁹⁰ T.T. Konciewicz, 'Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of the Heart' (2019) 26 *Indiana Journal of Global Legal Studies* 501.

⁵⁹¹ G. de Búrca, 'Europe's *raison d'être*', in D. Kochenov and F. Amtenbrink (eds), *European Union's Shaping of the International Legal Order* (Cambridge: CUP, 2013).

⁵⁹² This includes both the national and the supranational level: D. Kochenov and B. Grabowska-Moroz, 'Constitutional Populism versus EU Rule of Law: A Much More Complex Story than You Have Imagined', in M. Krygier and W. Sadurski, *Responses to Constitutional Populism* (Cambridge: CUP, 2021).

⁵⁹³ C. Closa, 'Reinforcing of EU Monitoring of the Rule of Law', in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016), 15.

⁵⁹⁴ Opinion of AG Bobek delivered on 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim et al.*, EU:C:2021:403, para. 138.

Sammanfattning på svenska

Under senare år har EU-domstolen i grunden stärkt den europeiska konstitutionalismen med utgångspunkt i rättsstaten, som är ett etablerat värde och en princip i EU-rätten sedan lång tid tillbaka. Processen är ännu pågående och handlar om de bedömningar som domstolen har gjort under den tid som rättsstaten har försvagats, först i Ungern och sedan i Polen.

Syftet med denna rapport är att presentera och kritiskt analysera EU-domstolens bedömningar i centrala mål och rättsfall. Genomgången börjar med domstolens dom av den 27 februari 2018 i mål C-64/16, *ASJP (Portugisiska domare)* och avslutas med domen av den 15 juli 2021 i mål C-791/19, *Europeiska kommissionen mot Republiken Polen (Disciplinåtgärder mot domare)*. Rapporten är således utformad som en rättsfallsstudie: den innehåller centrala utdrag ur domar och en kritisk bedömning av de viktigaste beslut och domar från EU-domstolen som sedan 2018 har omformat innebörden och räckvidden av EU:s rättsstatsprincip och därmed förknippade rättsliga skyldigheter. Studien är av intresse för alla dem som vill skaffa sig sakkunskap om den senaste och mycket viktiga utvecklingen av EU:s rättsstatsprincip sedd utifrån EU-domstolens beslut och domar, både tagna var för sig och som en helhet.

Precisering av kravet på effektivt domstolsskydd och oberoende domstolar

Rapporten inleds med en ingående granskning av en dom som ökar förståelsen av medlemsstaternas skyldighet att se till att deras domstolar uppfyller kravet på ett effektivt domstolsskydd. Det handlar om domen i målet *ASJP*, kallat *Portugisiska domare*, som EU-domstolen avgjorde (i stora avdelningen) och som kan anses vara lika banbrytande som avgörandena i målen *Van Gend en Loos* och *Costa*.

Denna dom kan också betraktas som domstolens första viktiga men indirekta svar på den pågående tillbakagången för rättsstaten, en utveckling som först konstaterades i Ungern och nu pågår även i Polen. Den markerar ett nytt skede när det gäller rättsstaten som ett grundläggande och bindande värde i EU:s rättsordning. Detta värde slås fast i artikel 2 i EU-fördraget och får ett konkret och rättssäkert uttryck i bland annat artikel 19.1 andra stycket i EU-fördraget: ”Medlemsstaterna ska fastställa de möjligheter till överklagande som behövs för att säkerställa ett effektivt domstolsskydd inom de områden som omfattas av unionsrätten.”

Därefter granskas flera beslut och domar från EU-domstolen som bygger på Europeiska kommissionens tillsyn av medlemsstaternas skyldighet att se till att deras domstolar uppfyller kravet på ett effektivt domstolsskydd. Först presenteras

fyra beslut som EU-domstolen utfärdade inom ramen för överträdelseärenden och som i samtliga fall rör Polen: C-441/17 R (*Białowieżaskogen*), C-619/18 R (*Högsta domstolens oavhängighet*), C-791/19 R (*Oavhängigheten för disciplinnämnden vid Polens högsta domstol*) och C-204/21 R (*Polens munkavlelag*). Det första beslutet, om urskogen Białowieża, fattades innan EU-domstolen utfärdade sin dom i målet *Portugisiska domare*. Det tas ändå upp här, eftersom det föregrep domstolens beslut i senare överträdelseärenden som direkt och på ett helt nytt sätt berörde skyddet av domstolarnas oberoende i Polen. När det gäller EU-domstolens domar, och som avgetts inom ramen för överträdelseförfaranden, analyseras mål C-192/18 (*De allmänna domstolarnas oberoende*), mål C-619/18 (*Högsta domstolens oavhängighet*) och mål C-791/19 (*Disciplinåtgärder mot domare*). I och med dessa tre domar blev Polen den första EU-medlemsstat som har befunnits skyldig till att ha brutit mot artikel 19.1 andra stycket i EU-fördraget tre gånger i rad.

Efter detta granskas de två viktigaste avgöranden som domstolen hittills har meddelat i form av förhandsavgöranden till nationella domstolar som efterfrågat besked om hur EU-rätten ska tolkas. I båda fallen var det polska domstolar som hade begärt förhandsavgörande i fråga om kraven på domstolarnas oberoende enligt artikel 19.1 i EU-fördraget och/eller artikel 47 i EU:s stadga om de grundläggande rättigheterna. Det handlar om de förenade målen C-585/18, C-624/18 och C-625/18, *A.K. m.fl. (Oavhängigheten för disciplinnämnden vid Högsta domstolen)* och de förenade målen C-558/18 och C-563/18, *Miasto Łowicz och Prokurator Generalny*.

Dessa två domar förtydligar skyldigheten att säkerställa att nationella domstolar uppfyller kravet på ett effektivt domstolsskydd men illustrerar också en ny utveckling: nationella domare som är föremål för påtryckningar och hot har börjat använda artikel 267 i EU:s funktionsfördrag som ett verktyg för självförsvar. Att begära förhandsavgöranden har därmed kommit att fungera som ett instrument för att upprätthålla EU:s grundläggande värderingar i ett sammanhang där Europeiska kommissionen tycks ha varit senfärdig och sparsam med att inleda överträdelseförfaranden.

EU:s medlemsstater får inte försämra skyddet av rättsstaten

För att denna rapport inte ska bli än mer omfattande har domstolens förhandsavgöranden av den 20 april 2021 i mål C-896/19 (*Repubblika-domen*) och av den 18 maj 2021 i de förenade målen C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 och C-397/19 (*Rumänska domare*) inte granskats var och en för sig utan slagits ihop med analysen av domstolens dom av den 15 juli 2021 inom ramen för ett överträdelseförfarande om Polens nya disciplinåtgärder mot domare (mål C-791/19) samt domstolens förhandsavgörande av den 2 mars 2021 om Polens ”falska domare” (mål C-824/18). Syftet med detta är inte att förminska deras betydelse och mervärde: i de båda avgörandena från april respektive maj 2021 klargör domstolen bland annat att nationella myndigheter

har en negativ såväl som positiv skyldighet att respektera EU:s krav på oberoende domstolar samt en skyldighet att inte sänka nivån på detta område.

I mer praktiska termer innebär dessa avgöranden att en stat som har anslutit sig till EU inte får införa bestämmelser som undergräver domstolars oberoende. Det skulle strida mot artikel 19.1 andra stycket i EU-fördraget, enligt vilken nationella myndigheter är förbjudna att anta ny lagstiftning som försämrar skyddet av rättsstaten som värde, i synnerhet EU:s garantier om domstolars oberoende. Avgörandena innebär också en skyldighet att avstå från lagändringar som undergräver rättsstatsprincipen – vilket till exempel blir fallet när en ny särskild åklagaravdelning inrättas och används som ett instrument för påtryckningar och hot mot domare, eller när nationella myndigheter inför nya regler om domares personliga ansvar utan garantier för att de ska kunna stå emot risken för yttre påtryckningar på innehållet i rättsliga beslut.

Påverkan på rättspraxis och begrepp inom andra områden

I denna rapport undersöks även ett antal fall som inte direkt berör frågor om domstolars oberoende. Fallen visar att rättsstatens tillbakagång i vissa EU-länder har haft en betydande men ofta indirekt påverkan på andra områden som omfattas av domstolens rättspraxis. Av fallen framgår också att domstolen främst har utgått från situationen i Polen i sin omvärdering av tolkningar och tillvägagångssätt när det gäller flera grundläggande begrepp i EU-rätten. Denna påverkan framgår först och främst av en strängare tolkning av innebörden av begreppet ”domstol” (i den mening som avses i artikel 267 i funktionsfördraget), en tolkning som användes i mål C-274/14 *Banco de Santander*. En liknande skärpning av begreppet ”utfärdande rättslig myndighet” – i den mening som avses i den europeiska arresteringsordern – kan konstateras i de förenade målen C-508/18 *OG (Åklagarmyndigheten i Lübeck)* och C-82/19 *PPU PI (Åklagarmyndigheten i Zwickau)* samt i mål C-509/18 *PF (Litauens allmänna åklagare)*.

En annan viktig utveckling, som sannolikt åtminstone delvis har kommit till stånd som en reaktion på Polens rättsstatskris, kan konstateras i mål C-284/14, kommissionen mot Frankrike (*Förskottsbetalning*). Där erbjöd domstolen en efterlängtd justering av de så kallade Cilfit-kriterierna, som avgör när de högsta instanserna i medlemsstaterna ska begära förhandsbesked från EU-domstolen. I mål C-284/16 *Achmea* tryckte domstolen också på ett strängare försvar av de nationella domstolarnas behörighet att se till att EU-rätten får full verkan. I det här fallet skapar försvaret av de nationella domstolarna dock problem: investerare som tidigare omfattades av bilaterala investeringsavtal inom EU riskerar att stå utan rättsligt skydd i länder där rättsstatsprincipen sviktar.

I mål C-216/18 *PPU LM (Celmer)* gjorde domstolen det också möjligt, åtminstone i teorin, för rättskipande myndigheter som ska verkställa europeiska arresteringsorder att ställa högre krav i fråga om de skyldigheter som är förknippade med ömsesidigt förtroende. Nationella rättskipande myndigheter

ska således kunna ta hänsyn till systembrister som kan inverka på oberoendet för det nationella rättsväsendet i en medlemsstat där rättsstaten är på tillbakagång. Denna justering kan dock betraktas som uppenbart otillräcklig med hänsyn till den systemiska karaktären på och den nuvarande omfattningen av Polens brott mot rättsstatsprincipen.

Slutligen har EU-domstolen skärpt tolkningen av kravet på ”fastställt genom lag”. Det gjordes inom ramen för en omfattande översyn av ett EU-förfarande för utnämning av domare i domen av den 26 mars 2020, avgjord i stora avdelningen, i de förenade målen C-542/18 RX-II *Simpson* och C-543/18 RX-II *HG*. Domen gällde inte utnämning av domare på nationell nivå, men det var lätt att se hur domstolens resonemang kunde tillämpas på situationen i Polen där tydliga oegentligheter upprepade gånger har påverkat utnämningar av flera personer, särskilt till Högsta domstolen.

Senaste utmaningen: EU-rättens tillämpning på utnämning av domare på nationell nivå

Rapporten avslutas med domstolens senaste avgörande utmaning: hur ska de många felaktigt utnämnda ”domarna” hanteras? För att förstå det nya och komplexa med problemet analyseras domstolens dom av den 2 mars 2021 i mål C-824/18, *AB m.fl. (Utnämning av domare till Högsta domstolen – talan)*. Detta är EU-domstolens hittills viktigaste dom när det gäller möjligheten att tillämpa EU-rätten på *nationella* förfaranden för utnämning av domare.

Domen i sig är domstolens tredje viktiga dom inom ramen för ett förhandsavgörande som bygger på en begäran från en polsk domstol (i det här fallet Polens högsta förvaltningsdomstol) och som tar upp frågor med koppling till den polska rättsstatens sammanbrott. Förhandsavgörandet är ett av totalt 37 fall (och det kommer hela tiden fler) där polska domstolar har bett EU-domstolen om förhandsavgörande i frågor som rör rättsstaten. Detta ska jämföras med totalt fyra överträdelseärenden som kommissionen hittills har överlämnat till EU-domstolen. Med så många preliminära fall som återstår att hantera kommer EU-domstolen sannolikt att ytterligare klargöra i vilken mån EU-rätten kan åberopas för att hantera situationer där personer utnämns till domare på grundval av bristfälliga förfaranden, det vill säga förfaranden som röjer ett otillbörligt inflytande från den lagstiftande och den verkställande makten.

EU-domstolens rättspraxis har fördjupat EU som konstitutionellt system

Efter denna i stort sett kronologiska översikt avslutas rapporten med en övergripande analys av de centrala konsekvenserna av EU-domstolens bidrag i arbetet mot tillbakagången för rättsstaten. Även om det finns blinda fläckar i domstolens rättspraxis har den bidragit med en utveckling av EU-rätten som är en av de viktigaste sedan domstolen lade fast sin grundläggande rättspraxis i början av 1960-talet. Denna mångfacetterade rättspraxis – som förebådades i

domstolens interimistiska beslut i målet om Białowieżaskogen och utvecklades fullt ut i domen i målet *Portugisiska domare* – har med andra ord lett till en förnyelse av de viktigaste elementen i EU:s konstitutionalism. Förnyelsen innebär att det har utvecklats en mer substantiell idé om rättsstatsprincipen på överstatlig nivå. Stödet för detta har varit en rättslig ”aktivering” av den hittills outnyttjade potentialen i artikel 19.1 i EU-fördraget. Denna aktivering kan beskrivas som en operationalisering av EU:s princip om ett effektivt domstolsskydd som är fullt berättigad och som har stöd i fördragen. Domstolen har därmed kunnat ingripa till försvar av en central och väletablerad del av rättsstatsprincipen: principen om domstolars oberoende.

Förutom alltmer detaljerade och bindande normer för domstolars oberoende har utvecklingen också inneburit en förbättrad rättslig dialog mellan EU-domstolen och nationella domstolar. I grund och botten handlar det om att EU:s värden håller på att överföras till det rättsliga området, vilket gör unionen till ett sant konstitutionellt system där rättsstatsprincipen och dess viktigaste komponenter har blivit en del av EU-rätten som kan göras gällande i domstol. Detta banar väg för en mer enhetlig europeisk dömande makt som vilar på grundläggande principer med bindande verkan på både nationell nivå och EU-nivå. Genom att leda denna utveckling har EU-domstolen stärkt EU:s ”värdedimension”, en dimension som tillsammans med den inre marknaden nu utgör EU:s grundpelare.

“... from the world of proclamations, the core values of the EU are moving to the realm of the law, turning the Union into a true constitutional system.”

Laurent Pech and Dimitry Kochenov



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