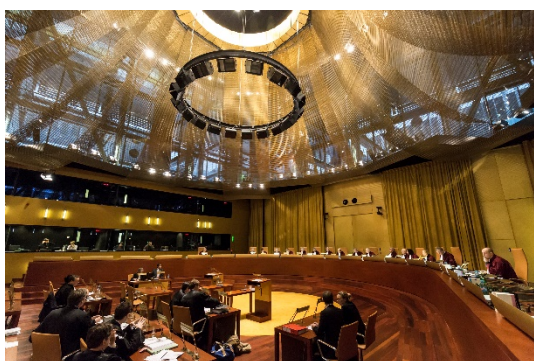


# European Court of Justice case law on judicial independence

## SUMMARY

Article 2 of the Treaty on European Union (TEU) lists the values upon which the Union is founded. According to this Article, these values are shared by the Member States and form the axiological backbone of EU law. The rule of law is listed, alongside democracy and fundamental rights, among the crucial values underpinning the Union. However, Article 2 TEU is more than just a mere declaration; it is also a source of binding obligations upon the Member States to uphold the Union's values, and therefore also the rule of law. The latter concept, despite broad discussions as to its exact content, undoubtedly entails such elements as judicial independence, understood in particular as the independence of the judiciary from other branches of government (legislative, executive). All other elements of the rule of law, such as the principle of legality, whereby government may act only on the basis of law and within its boundaries, or the principle of constitutionalism, whereby the parliament's law-making powers must be exercised within the limits of the constitution, or the existence of judicial review to enforce those principles – all depend on judicial independence as their fundamental pre-condition.

Recently, however, faced with challenges to judicial independence in certain Member States (as evidenced by on-going Article 7 TEU proceedings), the European Union has started developing its own standards in this area. Examples include the Commission's rule of law framework (adopted in 2014), its two communications on the rule of law, and the annual rule of law report, the first of which was adopted in September 2020. The case law of the European Court of Justice (ECJ) plays a crucial role in this respect, and scholars point out that the Court has been the most effective EU institution with regard to safeguarding judicial independence in the Member States. The present briefing provides a concise chronological overview of the Court's recent case law on judicial independence – described by scholars as 'truly revolutionary' – starting from the 2018 *Portuguese Judges* case.



### IN THIS BRIEFING

- Introduction
- Overview of recent judgments
- Conclusions

## Introduction

[Article 2 of the Treaty on European Union \(TEU\)](#) lists the **values** upon which the Union is built. These values are common to the Member States and form the **axiological cornerstone** of EU law. Alongside democracy and fundamental rights, the **rule of law** is mentioned among the crucial values underpinning the Union. According to the majority of scholars of EU law, Article 2 TEU is not only a declaration of EU values, but also a source of binding legal norms.<sup>1</sup> The [concept of the rule of law](#), which is key to Western understanding of liberal democracy, entails a number of elements, including the judicial review of legislative and executive action in order to ensure the principles of supremacy of the constitution and legality (government limited by law). However, all these guarantees would be illusory without the foundation of **judicial independence from the executive and legislative powers**, which can be seen as a *sine qua non* of all other elements of the rule of law, because judicial review of the executive and legislative powers performed by individuals dependent on the legislative and/or executive could never be neutral.

The value of the rule of law finds its concretisation, as regards national judiciaries, in two further Treaty norms: [Article 19\(1\) second sub-para. TEU](#) and [Article 47 of the Charter of Fundamental Rights \(CFR\)](#). The former is a legal norm directed to the Member States, which are obliged to *'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'*, whereas the latter enshrines the fundamental rights to an effective remedy and to a fair trial before *'an independent and impartial tribunal previously established by law'*. Judicial independence is also structurally built into two other institutions of EU law: the **preliminary reference procedure**, whereby only an independent body is treated as a 'court or tribunal' within the meaning of Article 267 TFEU, and the **European arrest warrant**, where [Framework Decision 2002/584](#) provides explicitly that the fundamental rights of requested persons, as enshrined in the CFR and the European Convention on Human Rights (ECHR), need to be safeguarded (point 12 in the preamble and Article 1(3)). Therefore, questions of judicial independence can become relevant also in the context of admissibility of a preliminary reference or a European arrest warrant. Nonetheless, until recently, the concept of judicial independence was developed, at European level, mainly in the standards of the [Council of Europe](#) (in particular those developed by the [Venice Commission](#)) and, on a case-by-case basis, in the judgments of the [European Court of Human Rights \(ECtHR\)](#).<sup>2</sup> Lately, however, faced with challenges to judicial independence in certain Member States (as evidenced by on-going Article 7 TEU proceedings), the EU has begun developing its own standards in this area. Examples include the Commission's [rule of law framework](#) (adopted in March 2014),<sup>3</sup> its two communications on the rule of law,<sup>4</sup> and the [annual rule of law report](#) adopted in September 2020. The case law of the [European Court of Justice \(ECJ\)](#) plays a crucial role in this respect, and scholars point out that Court has been the most effective EU institution with regard to safeguarding judicial independence in the Member States.<sup>5</sup> Indeed, the Court has a long track record of institutionalising the rule of law in the European Union, ever since the seminal judgment in the [Van Gend en Loos](#) case, i.e. long before the value of the rule of law was enshrined in the Treaties.<sup>6</sup> The present briefing provides a concise chronological overview of the Court's recent case law on judicial independence – described by scholars as 'truly revolutionary'<sup>7</sup> – starting from the 2018 [Portuguese Judges case](#).

## Overview of recent judgments

### *Associação Sindical dos Juizes Portugueses (C-64/16)*

The [Associação Sindical dos Juizes Portugueses \(ASJP\) case](#), also known as the *Portuguese Judges case*, was the first in a series of judgments in which the ECJ began developing its new, robust doctrine of judicial independence. The case was concerned with salary cuts for judges at the Portuguese Court of Auditors. The ASJP, a judicial trade union, brought a case against the Court of Auditors to the Supreme Court, claiming that the reduction of salaries would undermine judicial independence. The Supreme Court of Portugal referred the question to the ECJ, and although the

judges themselves were unsuccessful (the reduction of salaries was not susceptible to undermine their independence), the European Court used the opportunity to make important points concerning the principle of judicial independence and its legal foundations within the Treaties, opening a new era in the development of EU constitutional law.

Crucially, the ASJP based its claims on two legal bases in EU law: [Article 19\(1\) second sub-para. TEU](#) and [Article 47 CFR](#). The national court took up this line of reasoning (para. 16), seeing Article 19(1) TFEU as an appropriate legal basis within EU law, for the principle of judicial independence. The ECJ agreed, pointing out that Article 19 TEU *'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'* (para. 32). The ECJ linked Article 19 to the **principle of sincere cooperation**, expressed in [Article 4\(3\) TEU](#), pointing out that: *'The Member States are ... obliged, by reason ... of the principle of sincere cooperation ... to ensure, in their respective territories, the application of and respect for EU law ... In that regard, ... 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'* (para. 34). The link between effective judicial protection and judicial independence was found in **Article 47 CFR**: *'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'* (para. 41). The ECJ considered that judicial independence was *'inherent in the task of adjudication'* (para. 42) and that it was *'essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism'* (para. 43). This allowed the ECJ to flesh out the main **component elements of the concept of judicial independence**, which, according to the Court, *'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'* (para. 44).

### *Minister of Justice and Equality (C-216/18)*

Ireland received a [European arrest warrant](#) (EAW) concerning a Polish national. Whereas the procedure of surrendering under the EAW is generally based on mutual trust between the EU judiciaries, this **trust has its limits**.<sup>8</sup> This was recognised by the ECJ in its judgment of 5 April 2016 in Joined Cases C-404/15 and C-659/15 PPU [Aranyosi and Căldăraru](#).<sup>9</sup> The Court ruled that if there was 'objective, reliable, specific and properly updated evidence' concerning the deficiencies in detention conditions, which would amount to a **breach of fundamental rights** (Article 4 of the Charter, prohibiting inhuman and degrading treatment), the requested court should verify this and, if confirmed, the court should not surrender the individual in question.

In Case C-216/18, the Irish court asked to surrender the Polish national to Poland (i.e. the executing judicial authority) drew attention to the fact that, in the light of reports by the Venice Commission, the independence of the Polish judiciary had been compromised (Irish High Court, [Judgment of 12 March 2018, Minister of Justice and Equality v Celmer](#)). The judge noted, inter alia: changes to the constitutional role of the National Council for the Judiciary (KRS) in safeguarding the independence of the judiciary; the fact that the Minister for Justice was then Public Prosecutor and was entitled to play an active role in prosecutions, with a disciplinary role in respect of presidents of courts, with a potentially chilling effect on those presidents and a consequential impact on the administration of justice; the fact that the Polish Supreme Court was affected by compulsory retirement and future appointments and that the new composition of the National Council for the Judiciary would be largely dominated by political appointees; and the fact that the integrity and effectiveness of the Polish Constitutional Court had been greatly interfered with, in that there was no guarantee that

laws in Poland would comply with the Polish Constitution, which was sufficient in itself affect the entire criminal justice system. Given these circumstances, there was doubt as to whether surrendering the Polish national would not deprive him of his right to a fair trial, as provided for under Article 6 of the European Convention on Human Rights. The Irish court explicitly referred to the *Aranyosi and Căldăraru* case.

In its [judgment of 25 July 2018](#), the ECJ relied on *Aranyosi and Căldăraru*, recognising that *'limitations may be placed on the principles of mutual recognition and mutual trust between Member States "in exceptional circumstances"'* (para. 43). It noted that the EAW system is based on the assumption that *'not only the decision on executing a European arrest warrant, but also the decision on issuing such a warrant, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection – including the guarantee of independence'* (para. 56). Therefore, *'the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, ..., is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant'* (para. 59). Discussing specific elements of judicial independence, the ECJ noted that rules on the composition of courts and the appointment, length of service, rejection, dismissal and abstention of judges must be framed so as 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'* (para. 66). Specifically, the dismissal of judges must be determined by express legislative provisions (para. 66). A disciplinary regime for judges must display the necessary guarantees to prevent any risk of being used as a system of political control of the content of judicial decisions (para. 67). In conclusion, the Court found that the executing judicial 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 ... there are substantial grounds for believing that that [the wanted] person will run such a risk if he is surrendered to that State'*. In other words, the mere fact that there are systemic deficiencies in the rule of law in the issuing Member State is not sufficient – the **executing judicial authority must analyse whether the wanted person will, as an individual, face the risk of not having the right to a fair trial**. The Irish Supreme Court, hearing the case following the ECJ's answer, found that in the Polish national's individual situation, the deficiencies of the rule of law in Poland would not deprive him of his right to a fair trial ([Judgment of 12 November 2019, \*Minister of Justice and Equality v Celmer\*](#)).

## *Commission v Poland* – Retirements from Supreme Court (C-619/18)

Following a lowering of the retirement age of Supreme Court judges from 70 to 65, which would lead to the removal of a significant portion of Supreme Court judges, the European Commission first issued recommendations under the rule of law framework,<sup>10</sup> and given Poland's rejection thereof, brought [a case](#) to the ECJ alleging infringement of the second sub-paragraph of Article 19(1) TEU and Article 47 CFR. Importantly, under the Polish rules, the President of Poland was granted the power to extend, **at his discretion**, the period in office of judges affected by the new legislation, for a period of three years, no more than twice. The President's decision was to be taken following a consultation of the National Judiciary Council. The ECJ introduced interim measures (orders of [19 October 2018](#) and [17 December 2018](#)), effectively suspending the application of the Polish legislation and reinstating the Supreme Court judges. Poland complied with the ECJ's orders by adopting a separate [legislative act](#) of 21 November 2018, by virtue of which the judges in question were reinstated to the Supreme Court within the deadline ordered by the ECJ. The Court delivered its [judgment](#) on 24 June 2019, finding that by lowering the retirement age of the judges of the Supreme Court for judges in posts appointed to that court before 3 April 2018 and 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, the Republic of Poland had failed to fulfil its obligations under Article 19(1) TEU. The Court pointed out that while the organisation of justice in the Member States fell within their competence, when exercising that competence, they must comply with their EU law obligations, especially Article 19(1) TEU. This did not mean that the EU was taking over that competence from the Member States. Concerning [Protocol No 30](#) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, the ECJ noted that it did not concern Article 19(1) TEU, and did not exempt Poland from the obligation to comply with the Charter. The Court further argued that Article 19(1) TEU required all Member States to ensure that their national courts that come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection. The Polish Supreme Court falls under this category, as it decides cases in fields covered by EU law. Therefore, **maintaining its independence is essential**. Concerning the reform challenged by the Commission, the Court observed that it applies to judges already serving on the Supreme Court, **prematurely terminating their term in office**, and therefore raised reasonable concerns as regards compliance with the principle of the irremovability of judges. Whereas Poland claimed that the lowering of the pension age to 65 was aimed at standardising that age, the ECJ drew attention to a [Venice Commission opinion](#) that indicated that the actual aim was to side-line a certain group of judges of the Supreme Court. Furthermore, the ECJ criticised the mechanism allowing the President of the Republic to prolong the term in office by two consecutive 3-year periods, at his discretion (up to six years). This raised doubts as to whether the reform was genuinely aimed at standardising the retirement of judges with other employees. Rather, the reform's aim *'might be to exclude a pre-determined group of judges'* of the Supreme Court. The lowering of the retirement age by five years would also lead to a 'major restructuring' of the Court, therefore raising doubts as to the genuine goal of the reform. Moreover, the retirement age for ordinary employees (not judges) gives a right to a pension, but does not automatically terminate their employment. The ECJ concluded that Poland did not provide any objective reasons for introducing automatic retirement. Finally, the lack of transitional measures for judges already sitting on the Court violated the principle of proportionality.

### *Commission v Poland* – Retirement of ordinary judges (C-192/18)

According to the Commission, in lowering, by an act of the Polish Parliament of 12 July 2017, the retirement age applicable to judges of the ordinary Polish courts to 65 years for men and 60 years for women while at the same time granting the Minister for Justice the right to decide whether to authorise extension of the period of active service as a judge to the age of 70 years, Poland infringed Article 19(1) TEU in conjunction with Article 47 CFR. In its [judgment of 5 November 2018](#) the Court reiterated its reasoning from Case C-619/18 *Commission v Poland* on the applicability of these two standards to Member States when deciding on the organising of the national judiciary, adding that it was undisputed that Polish ordinary courts decide questions of EU law. The ECJ underlined that the principle of irremovability was of *'cardinal importance'* and *'an exception thereto is thus 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 courts concerned to external factors and their neutrality with respect to the interests before them'* (para. 115). That was not the case with the Polish reform. The Commission did not criticise the lowering of the retirement age per se, but rather the **mechanism under which the Minister for Justice had the right to authorise judges to continue actively to carry out judicial duties beyond the new retirement age**, as lowered. The criteria that the minister was to use were *'too vague and unverifiable'* (para. 122) and the length of the period for which the judges had to wait for the decision of the Minister for Justice once the extension had been requested, fell within the minister's discretion. In fact, the preparatory documents relating to the reform and the powers vested in the minister could *'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'* (para. 127). The ECJ therefore ruled that Poland was in breach of Articles 19(1) TEU and 47 CFR.

### *AK v Krajowa Rada Sądownictwa (C-585/18, C-624/18 & C-625/18)*

*AK v KRS* was concerned with the independence of the newly created [Disciplinary Chamber in Poland](#), a body entrusted with disciplinary cases of judges, prosecutors and lawyers, as well as with deciding on lifting judicial and prosecutorial immunity. The referring court had doubts as to whether that Chamber, which was in the course of being appointed at the time of reference, would provide sufficient guarantees of independence and impartiality. In its [judgment of 19 November 2018](#), The ECJ referred to Article 52(3) CFR, which states that insofar as the Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR. Therefore, in interpreting Article 47 CFR, the ECJ **analysed the case law of the ECtHR** to ensure that the interpretation it gave Article 47 CFR safeguarded *'a level of protection which does not fall below the level of protection established in Article 6 [ECHR] as interpreted by the [ECtHR]* (para. 118). The ECJ referred to a number of ECtHR judgments, and analysed, in their light, whether the Disciplinary Chamber is independent and objective. However, it noted that it was ultimately for the referring court (the Labour Chamber of the Supreme Court) to rule on that matter, since Article 267 TFEU did not empower the ECJ to apply rules of EU law to a particular case, but only to rule on the interpretation of EU law.

The ECJ focused on the role of the [National Judiciary Council \(KRS\)](#) in the appointment of members of the Disciplinary Chamber. Given that the KRS was recently reformed, the ECJ asked the referring court to ascertain whether or not the KRS offered sufficient guarantees of independence in relation to the legislature and the executive. The national court should in particular take into account 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 before the reform**, 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 legislature. This reform raised **the number of KRS members originating from or elected by the political authorities to 23 of its 25 members**. The national court should also look into potential irregularities in the appointment process. For the purpose of an overall assessment of the KRS, the referring court may also take into account the way in which the reformed KRS 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.

Apart from looking into the KRS, the ECJ invited the national court to scrutinise more closely the **circumstances in which the new judges of the Disciplinary Chamber were appointed** and the role of the KRS in that regard. In particular, the national court was advised to look into the fact that the Disciplinary Chamber received exclusive jurisdiction to rule on cases of the employment, social security and retirement of judges of the Supreme Court, which previously fell within the jurisdiction of the ordinary courts. The context of a simultaneous lowering of the retirement age of judges (cf. case C-619/18) was also significant. Furthermore, the national court should also take into consideration that the Disciplinary Chamber must be constituted **solely of newly appointed judges**, thereby excluding judges already serving in the Supreme Court. Thirdly, although the Disciplinary Chamber is formally a chamber of the Supreme Court, it enjoys a particularly high degree of autonomy. Summarising these indications, the ECJ noted that *'although any one of the various facts referred to ... 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'* (para. 153). The referring court (Labour Chamber), upon receiving the ECJ's answer, [ruled on](#)

[5 December 2019](#) that the Disciplinary Chamber *'is not a court within the meaning of Article 47 CFR and Article 6 of the Convention and Article 45(1) of the Constitution'*.

### *Miasto Łowicz v Wojewoda Łódzki* (C-558/18 and C-563/18)

In [Joined Cases C-558/18 and C-563/18](#) *Miasto Łowicz v Wojewoda Łódzki*, two Polish judges sought guidance from the ECJ as to whether the new regime for disciplinary proceedings against judges in Poland met the requirements of judicial independence under Article 19(1) TEU. The government of Poland argued that rules on disciplinary proceedings against judges fell within the competences of the Member States, and for this reason, EU law did not apply to their assessment. Furthermore, the Polish government added that the ECJ's reply was not necessary to resolve disputes in the main proceedings, as they had nothing to do with the disciplinary regime in Poland (the referring judges were not currently subject to any disciplinary proceedings). In its [judgment of 26 March 2020](#), the ECJ agreed with the Polish government that the requests were inadmissible. However, the Court used the occasion to reiterate its interpretation of Article 19 TEU, recalling that it was intended 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'* (para. 34), and adding that *'although 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'* (para. 36).

### *VQ v Land Hessen* (C-272/19)

The Administrative Court of Wiesbaden in Hesse made a preliminary request in proceedings concerning access to personal data. The referring court had doubts as to whether it was independent for the purposes of Article 47 CFR and Article 267 TFEU. It drew attention to numerous forms of influence of the Minister of Justice of Hesse upon the court that, in its view, could undermine the court's independence and impartiality. First, the Ministry determined the means of communication and IT facilities used by the courts, which in practice meant that the executive branch could access all the courts' data. Second, judges could feel pressure due to the fact that the Ministry managed a workload statistic. Third, data protection by Hessian courts was decided upon by the Ministry of Justice with no supervision by the courts. Furthermore, the appointment, appraisal and promotion of judges lied in the competence of the Minister of Justice. The minister also decided about their missions, e.g. within the European Judicial Training Network. Hesse provided for the possibility of appointing temporary judges from among public officials. The Ministry of Justice recorded the professional contact details of all the judges in a human resources information management system that was under the responsibility of the regional executive, which had access to that data. Finally, the Minister of Justice decided on the number of judges and number of posts in each court, on the non-judicial staff assigned to courts, and on the extent of the IT facilities of each court. In [judgment of 9 July 2020](#), the ECJ pointed out that the documents submitted by the referring court contained *'no indication as to the manner in which the executive uses its powers in that regard are such as to engender legitimate doubts, particularly in the minds of litigants, concerning whether the judge concerned is impervious to external elements and whether he or she is impartial with respect to the opposing interests that may be brought before him or her'* (para. 59), concluding that the factors mentioned in the preliminary reference *'cannot, in themselves, be sufficient ground for a conclusion that those doubts are well-founded and that that court is not independent'* (para. 60).

### *L. and P.* (C-354/20 PPU and C-412/20 PPU)

The District Court in Amsterdam made preliminary requests in proceedings concerning European arrest warrants (EAW) issued by Polish courts against L. and P. The Dutch court pointed to the rule of law backsliding in Poland, noting inter alia ECJ judgments in the *AK* and *Miasto Łowicz* cases, the judgment of the Labour Chamber of the Polish Supreme Court of 5 December 2019 finding that the National Judiciary Council was no longer an impartial body independent of the executive and

legislative powers, as well as action brought by the Commission against Poland in case C-791/19. The Amsterdam judges also noted new Polish legislation on disciplinary proceedings against judges, and the fact that the Disciplinary Chamber continued to operate with regard to lifting of criminal immunity of judges. Referring to Article 19 TEU, Article 47 CFR and the framework decision on European arrest warrants, the Dutch judges wished to know if they could refuse to surrender L. and P. to Poland given that the issuing Polish court *'no longer meets the requirements of effective or actual judicial protection since [Polish] legislation no longer guarantees the independence of that court'*, noting however that the individuals wanted by Poland under the warrant had *'not expressed any specific concerns ... aside from those systemic and generalised deficiencies'*. In other words, the Amsterdam court wished to invite the ECJ to reconsider its finding in the Celmer case (C-216/18 – see above). In its [judgment of 17 December 2020](#), the ECJ upheld its ruling in case C-216/18 (*Minister of Justice and Equality*) and clearly stated that the requested court *'cannot presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial ... without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled'*. In other words, the Court reiterated the requirement that the executing judicial authority verify concretely the possible violation of fundamental rights of the requested person.

### *ABv Krajowa Rada Sądownictwa (C-824/18)*

Five individuals stood as candidates to the Supreme Court in competitions organised in 2018. They were not selected by the National Judiciary Council (KRS). The KRS adopted resolutions rejecting these applicants, and selecting other persons to be proposed to the President for appointment. The unsuccessful candidates lodged appeals against those resolutions to the Supreme Administrative Court (NSA). In its request for a preliminary ruling, the NSA pointed out that following a recent reform, the Act on the KRS provided that, in individual cases concerning appointment to a position as judge at the Supreme Court, unless all participants in the competition procedure had challenged the KRS resolution, the latter became final as regarded the decision to present a proposal for appointment for participants in the procedure who did not lodge an appeal. However, as the NSA pointed out, those who won the competition had no interest in challenging the KRS's decision selecting them. In any event, even if the KRS resolution were to be annulled, the successful applicants' applications would not be re-examined if the post at the Supreme Court had already been filled in the meantime. As a result, judicial review of KRS's decision to propose certain candidates did not exist.

In its [judgment of 2 March 2021](#), the ECJ pointed out that the Supreme Court, to which the applicants in the main proceedings wanted to be appointed to, is a court that may be called upon to rule upon the application or interpretation of EU law, and therefore falls within the scope of Article 19(1) TEU (para. 114). Consequently, maintaining the Supreme Court's independence was essential also from the perspective of EU law (para. 115). Independence and impartiality presupposes *'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, that are such as 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'* (para. 118). Such rules, including procedural rules on judicial appointments, must be of such a nature 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'* (para. 123). **The involvement of the KRS in the procedure, given the controversies as to that body's independence from the legislature and executive, makes the existence of an effective remedy against a KRS resolution all the more important.** A crucial issue was *'whether such an action allows an effective judicial review to be conducted of [KRS] resolutions, covering, at the very least, an examination of whether there was no ultra vires or improper exercise of authority, error*



*of law or manifest error of assessment'*(para. 128). Therefore, *'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 ... 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'*(para. 129). In other words, the doubts surrounding KRS's independence made the lack of remedies against KRS resolutions problematic from an EU law perspective. Therefore, if the national court *'were to conclude that the KRS does not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates ... 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'*(para. 136).

### *Repubblika v Il-Prim Ministru (C-896/19)*

The Constitutional Court of Malta submitted a request to the ECJ for a preliminary ruling in a case brought by the 'Repubblika' association (a non-governmental organisation dedicated to promoting the rule of law in Malta) against the Maltese Prime Minister. Repubblika brought a constitutional complaint concerning the conformity with EU law of rules in the Maltese Constitution governing the procedure for the appointment of members of the judiciary. Repubblika claimed that the **Prime Minister's discretion to appoint members of the judiciary**, as provided for in the Constitution, raised doubts as to the independence of those judges and magistrates, adding that a number of members of the judiciary appointed since 2013 were active in the Labour Party, which was in government, or had been appointed in such a way as to give rise to suspicion of political interference in the judiciary. In its [judgment of 20 April 2021](#), the ECJ found that the Maltese reforms were in conformity with EU law. On this occasion, the ECJ made important statements on the role of Articles 2 and 19 TEU in the EU legal order and their effect in national law. The Court emphasised 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 in the protection of the value of the rule of law'* (para. 63). As a consequence, EU Member States are *'required to ensure that ... any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary'* (para. 64). According to the Court, Article 19(1) TEU precludes *'national provisions relating to the organisation of justice which are such as to constitute a reduction ... in the protection of the value of the rule of law, in particular the guarantees of judicial independence'*(para. 65). Concerning the judicial appointments in Malta, the ECJ noted that the Constitutional Court's doubts related, in essence, to the national provisions that conferred on the Prime Minister decisive power in the process for appointing members of the judiciary, while providing for involvement, in that process, of the Judicial Appointments Committee (JAC), a body assessing candidates for judicial office and providing an opinion to that Prime Minister. The ECJ noted that the JAC was only formed in 2016, as part of a constitutional reform adopted after Malta's accession to the EU and was actually designed to reinforce judicial independence (para. 69).

### *Romanian Judges Forum (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19)*

In its [judgment of 18 May 2021](#), the ECJ sitting as Grand Chamber decided on a series of preliminary references submitted by Romanian courts concerning inter alia questions of judicial independence. First, the ECJ analysed the Romanian **system of disciplinary proceedings for judges**. It found that the system in place allowed the executive to make interim appointments to the management

positions of the Judicial Inspectorate, the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges, without following the ordinary appointment procedure laid down by national law. The Court found that if that legislation *'is such as to give rise to reasonable doubts that the powers and functions of that body may be used as an instrument to exert pressure on, or political control over, the activity of those judges'* (para. 207), it would be in violation of Article 2 and Article 19(1) TEU. The Court pointed out that a disciplinary regime for judges *'must provide 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 that define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, provide for the involvement of an independent body in accordance with a procedure that 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 constitute a set of guarantees that are essential for safeguarding the independence of the judiciary'* (para. 198). Furthermore, *'it is essential that the body competent to conduct investigations and bring disciplinary proceedings should act objectively and impartially in the performance of its duties and, to that end, be free from any external influence'* (para. 199). The rules governing appointments to management positions of the disciplinary body must be such as to eliminate any reasonable doubt that the powers and functions of that body will not be used as an instrument to exert pressure on, or political control over, judicial activity (para. 200). However, national legislation will give rise to such doubts if it has the effect of allowing the government to make appointments to such management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors (para. 205).

Secondly, the ECJ analysed whether the **creation of a specialised section of the Prosecution Service, tasked exclusively with investigating judges and prosecutors**, complied with Articles 2 and 19 TEU. The ECJ found that creating such a section would be a breach of EU law if not justified by objective and verifiable requirements relating to the sound administration of justice, and not accompanied by specific guarantees such as, first, to prevent any risk of that section being used as an instrument of political control over the activity of those judges and prosecutors likely to undermine their independence and, second, to ensure that that exclusive competence may be exercised in respect of those judges and prosecutors in full compliance with the requirements arising from Articles 47 and 48 of the Charter. Thirdly, the court dealt with **financial liability of judges for 'judicial errors'**. Romanian law defined 'judicial error' as covering essentially two situations: (1) if *'in the course of legal proceedings, a procedural act has been performed in clear breach of provisions of substantive or procedural law, entailing a serious infringement of the rights, freedoms or legitimate interests of an individual and causing harm that it has not been possible to remedy by means of an ordinary or extraordinary appeal'* and (2) if *'a final judgment has been delivered that is manifestly contrary to the law or inconsistent with the factual situation established by the evidence taken in the course of the proceedings, entailing a serious infringement of the rights, freedoms or legitimate interests of an individual, and causing harm that it has not been possible to remedy by means of an ordinary or extraordinary appeal'* (para. 30). The ECJ noted that this definition of 'judicial error' was made *'in general and abstract terms'* (para. 241). The Court drew a clear line between, on the one hand, **state financial liability** for judicial errors (which is in conformity with Articles 2 and 19 TEU) and on the other, **personal liability of judges for the damages caused by a judicial error**. In the case of the latter, the Court found that such a system was problematic from the point of view of judicial independence, because the regime of personal liability of judges could be *'used as an instrument of pressure on judicial activity'*, and individuals could have doubts *'as to the imperviousness of the judges to external factors liable to have an effect on their decisions'* as a result of such a system.

### *Commission v Poland* – Disciplinary regime for judges (C-791/19)

The Commission brought an action against Poland alleging that the new disciplinary regime for Polish judges, introduced in 2019, violates Article 19(1) TEU. On 15 July 2021, the ECJ rendered its

[judgment](#), finding that – given the context in which it was created and staffed – the Disciplinary Chamber of the Supreme Court does not provide all the guarantees of impartiality and independence and, in particular, is not protected from the direct or indirect influence of the Polish legislature and executive. This is, *inter alia*, due to the fact that persons appointed to the Chamber were vetted by the new KRS, whose independence is doubtful on account of it now being elected exclusively by the legislature and executive. Furthermore, the judges of the Disciplinary Chamber have been selected from among individuals who were not Supreme Court judges before, and they have a very high level of remuneration and a particularly high degree of organisational, functional and financial autonomy compared with the 'old' chambers of the Court. The ECJ also reproached the disciplinary regime itself, stating that the very content of judicial decisions adopted by judges of the ordinary courts can be classified as a disciplinary offence. The Court noted that this could be used as a **vehicle for exerting political control over judicial decisions, including for exerting pressure on judges and influencing their decisions**. National judges are being exposed to disciplinary proceedings for having decided to make a reference for a preliminary ruling to the ECJ, undermining the system of judicial cooperation between the national courts and the Court of Justice.

## *Commission v Poland* – Polish rules on review of judicial independence (pending case C-204/21)

On 1 April 2021, the Commission brought a case against Poland concerning new rules prohibiting Polish judges from verifying whether a given judge is appropriately appointed and is independent. The Commission also took issue with new Polish provisions establishing the exclusive jurisdiction of the newly created Chamber of Extraordinary Control and Public Affairs of the Supreme Court to examine any complaints concerning the lack of independence of a court or a judge, as well as rules concerning the Disciplinary Chamber to decide on cases directly affecting the status and performance of the functions of judges (not only in disciplinary proceedings, but also concerning their immunity in criminal cases), as well as labour and social insurance law cases concerning judges of the Supreme Court, including cases relating to their retirement. Whereas the Court's judgment on the merits is still pending, on 14 July 2021 the Court issued an [order](#) requiring that Poland suspend all the relevant provisions concerned.

## Conclusions

Starting from the *Portuguese Judges* case, the ECJ has **operationalised the concept of the rule of law – one of the EU values** enshrined in Article 2 TEU, and specifically fleshed out the meaning of judicial independence as the core of this value. As Dimitry Kochenov and Laurent Pech [comment](#), this '*seminal judgment ... must be understood as being on a par with the Court's judgments in Van Gend en Loos and Costa*'. The case law analysed in this briefing cut through discussions as to whether the EU values are binding on the Member States, or are only 'programmatic' norms with no concrete legal effects. As the Court put it in the *Repubblika* judgment, compliance with Article 2 values '*is a condition for the enjoyment of all of the rights*' by a Member State. The Court provided a **clear link between Article 2 TEU and Article 19 TEU**. Article 47 of the Charter, providing the right of access to justice, is limited as to its scope of application by Article 51 of the same Charter – Member States are bound by it only insofar as they are 'implementing EU law'. By contrast, Article 19 TEU is broader, as it applies to 'fields covered by Union law' (*Portuguese Judges* case, para. 29, 37). Importantly, the Court clearly declared that **Article 19 TEU has direct effect**, i.e. it can be applied directly by national courts, and forms the basis for **disapplying a national measure** that breaches the rule of law and specifically the principle of judicial independence (Case C-824/18 *A.B.*; opinion of AG Bobek of 20 May 2021 in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim*, para. 19). In *Repubblika*, the ECJ introduced a **dynamic approach** to judicial independence, ruling that Article 19(1) TEU precludes reforms that would reduce such independence. Regardless, therefore, of a certain minimum threshold of such independence that

follows from EU law, Member States are precluded from reducing its level following their accession to the Union.

## MAIN REFERENCES

Díaz Crego M., Mańko R. and Ballegooij W. van, [Protecting EU common values within the Member States – An overview of monitoring, prevention and enforcement mechanisms at EU level](#), EPRS, European Parliament, September 2020.

Pech L. and Kochenov D.V., [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](#), SIEPS Report, 2021.

## ENDNOTES

- <sup>1</sup> 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](#)', *European Constitutional Law Review*, Vol. 6, 2010, p. 366; D. V. Kochenov, '[The Acquis and Its Principles: The Enforcement of the Law versus the Enforcement of Values in the EU](#)', in A. Jakab and D.V. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017; G. Itzcovich, '[On the Legal Enforcement of Values. The Importance of the Institutional Context](#)' in A. Jakab and D.V. Kochenov (eds.), *The Enforcement*, op.cit.; W. Schroeder, 'The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?', in A. von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States*, Springer 2021.
- <sup>2</sup> See R. Mańko, [Council of Europe standards on judicial independence](#), EPRS, European Parliament, May 2021.
- <sup>3</sup> See e.g. D. V. Kochenov and L. Pech, '[Enforcement of the Rule of Law in the EU: Rhetoric and Reality](#)', *European Constitutional Law Review*, Vol. 11, 2015.
- <sup>4</sup> Communication on further strengthening the rule of law in the Union: state of play and possible next steps, [COM\(2019\) 163](#), European Commission, 3 April 2019; and Communication on strengthening the rule of law within the Union: a blueprint for action, [COM\(2019\) 343](#), European Commission, 17 July 2019.
- <sup>5</sup> K.L. Scheppele, D.V. Kochenov and B. Grabowska-Moroz, '[EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union](#)', *Yearbook of European Law*, Vol. 39, 2020, pp. 6-7.
- <sup>6</sup> A. Magen and L. Pech, '[The rule of law and the European Union](#)', in C. May and A. Winchester (eds.), *Handbook on the rule of law*, Edward Elgar 2018, pp. 239-240.
- <sup>7</sup> Scheppele et al., p. 6.
- <sup>8</sup> P. Bárd and W. van Ballegooij, '[Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM](#)', *New Journal of European Criminal Law* 2018, Vol. 9(3), p. 355.
- <sup>9</sup> Cf. W. Van Ballegooij and P. Bárd, '[Mutual Recognition and Individual Rights: Did the Court Get it Right?](#)', *New Journal of European Criminal Law*, 2016, Vol. 7(4), pp. 439-464.
- <sup>10</sup> Recommendations: [2016/1374](#), [2016/146](#), [2017/1520](#), and [2018/103](#).

## DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2021.

Photo credits: © European Union – Court of Justice of the European Union.

[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu) (contact)

[www.eprs.ep.parl.union.eu](http://www.eprs.ep.parl.union.eu) (intranet)

[www.europarl.europa.eu/thinktank](http://www.europarl.europa.eu/thinktank) (internet)

<http://epthinktank.eu> (blog)

