

The European Court of Justice's jurisdiction over national judiciary- related measures



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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, focuses on the scope of the CJEU's jurisdiction over national measures relating to the organisation of national judiciaries. After providing an overview of the legal framework post Lisbon Treaty, the study offers a chronological outline and a transversal assessment of the CJEU's case law relating to the second subparagraph of Article 19(1) TEU. Five years after the CJEU's seminal judgment in *Associação Sindical dos Juizes Portugueses*, this Treaty provision has become the main vehicle through which national measures have been brought to the CJEU's attention, primarily via national requests for a preliminary ruling.

This document was requested by the European Parliament's Committee on Constitutional Affairs (AFCO Committee).

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LIST OF ABBREVIATIONS

ARoLR	Annual Rule of Law Report of the European Commission
ASJP	<i>Associação Sindical dos Juizes Portuguese</i>
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights or Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

Background

The **serious and sustained deterioration of the rule of law** situation in some EU Member States has led to a **proliferation of cases** brought to the Court of Justice of the EU (CJEU), particularly national requests for a preliminary ruling. This led the CJEU President in 2021 to warn that **the foundations of the EU as a Union based on the rule of law are under threat**. In 2022, the President of the European Court of Human Rights (ECtHR), with reference to the increasing number of judgments concerning judicial independence, similarly warned about a **worrying regression in the rule of law**.

CJEU and ECtHR data reflect the spreading and unprecedented backsliding in the rule of law which has been taking place in some EU Member States and the concomitant growing and unprecedented refusal to comply not only with national but also European judgments and orders. As regards the CJEU, one may refer to the striking increase in the number of national requests for a preliminary ruling since the Court clarified in 2018 in the case of *Associação Sindical dos Juizes Portugueses (ASJP)* that **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") **imposes a general and justiciable obligation on every Member State, not only to guarantee but also to maintain the independence of any national courts** which may be called upon to rule on questions relating to the application or interpretation of EU law.

As of 1 March 2023, more than **50 national requests** for a preliminary ruling (Article 267 TFEU) raising questions directly related to the potential incompatibility of national measures with the principle of effective judicial protection have been lodged with the Court of Justice post *ASJP* judgment. By contrast, the European Commission has made an extremely parsimonious use of its infringement powers (Article 258 TFEU) with a total of **5 infringement actions** lodged with the Court since 2018 in relation to systemic violations of the EU rule of law requirements organised by national authorities, including deliberate and repeated violations of the Court of Justice's judgments. As this study will outline, all of these infringement actions relate to Poland's rule of law crisis which began at the end of 2015.

Aim

This study aims to outline the scope of the **Court of Justice's jurisdiction over national measures or practices relating to the organisation of national judiciaries**, including specific courts such as a national supreme court or judges, either individually or as a group. To do so, this study will first provide a general overview of the legal situation post Lisbon Treaty and post *ASJP* judgment as regards the enshrinement of the rule of law in the Treaties; how the rule of law has been defined in EU law and the extent of the Court of Justice's jurisdiction under the exceptional procedure laid down in Article 7 TEU; the infringement procedure laid down in Article 258 TEU and the preliminary ruling procedure under Article 267 TFEU. The study will subsequently focus on the **Court of Justice's case law (as of 1 March 2023) relating to the second subparagraph of Article 19(1) TEU** as this provision has become the main vehicle through which national judiciary-related measures have been brought to the Court's attention either via direct infringement actions or via national requests for a preliminary ruling. This study will conclude with a **general and transversal overview of the Court of Justice's jurisdiction over national judiciary-related measures five years post ASJP judgment**. This overview will summarise the national measures which the Court has held incompatible with the principle of effective judicial protection (Article 258 TFEU) before outlining the type of national measures which this

principle precludes based on the Court's interpretation of Article 19(1) TEU provided to national courts in response to their references for a preliminary ruling (Article 267 TFEU).

Findings

- The rule of law is understood in EU law as requiring that **all public powers act within the constraints set out by law, in accordance with the values of democracy and respect for fundamental rights, and under the control of independent and impartial courts.**
- When it comes to the rule of law and the core legally binding principles it contains, in particular the principle of effective judicial protection by independent courts, the most important substantive provisions of EU primary law are Article 19(1) TEU and Article 47 CFR.
- The traditional understanding of the infringement procedure is that it could only be used to challenge national measures or practices falling within the scope of EU law whereas the preliminary ruling procedure could only be used by national courts faced with a legal dispute which comes within the scope of EU law. **This traditional understanding has proved problematic in an era of increasing and deliberate rule of law backsliding at Member State level** as many national measures seeking to undermine effective judicial protection by independent courts could be deemed to fall outside the scope of EU law.
- The Court of Justice addressed this problem in its *ASJP* judgment of 27 February 2018 by confirming that the **notion of "fields covered by Union law" mentioned in Article 19(1) TEU is broader than the notion of scope of EU law** and interpreting this provision as providing for a general and justiciable obligation for every Member State, not only to guarantee but also to maintain the independence of any national court and tribunal which may be called upon to rule on questions relating to the application or interpretation of EU law. Any such court or tribunal must meet the EU requirements of effective judicial protection such as judicial independence in accordance with the second subparagraph of Article 19(1) TEU.
- To date, the Commission has relied on the second subparagraph of Article 19(1) TEU to lodge infringement actions with the Court of Justice only in relation to Poland's "rule of law crisis". This has led the Polish government, supported by the Hungarian government in some instances, to repeatedly challenge the Court's jurisdiction. Two main claims have been made by these two governments in this context: The Court would lack jurisdiction as the organisation of national justice systems is an exclusive competence of the Member States; The second subparagraph of Article 19(1) TEU can only be relied upon in situations falling within the scope of EU law as is the case with Article 47 CFR and the general principles of EU law (Article 6(3) TEU).
- In response, the Court has repeatedly reiterated that **although the organisation of justice in the Member States falls within the competence of those Member States, 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. This means, inter alia, complying with the EU legal obligation to ensure that the national bodies, which constitute courts or tribunals within the meaning of EU law and come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection. This **obligation binds national authorities even in a situation where the relevant national measure does not implement EU law/does not fall within the scope of EU law.**

- The Commission has successfully challenged to date (i) **national legislation** concerning the lowering of the retirement age of judges of a Supreme Court; (ii) **national legislation** lowering the retirement age of judges of the ordinary courts and public prosecutors; and (iii) **national legislation** establishing a disciplinary regime applicable to judges of Supreme Court and to judges of the ordinary courts. In each of these infringement cases, the Court found one or more violations of the second subparagraph of Article 19(1) TEU. In addition, the Court confirmed that when reviewing national rules, it will pay attention to their content but also the country's general context; the reasons behind their adoption; and the way they are enforced. For the first time in 2023, in its fifth infringement action in relation to Poland's rule of law crisis, the Commission has asked the Court to review **the irregular composition and lack of independence of Poland's constitutional court as well as the decisions of this body** in light inter alia of the second subparagraph of Article 19(1) TEU.
- The Court of Justice has also been asked by national courts to interpret EU requirements relating to effective judicial protection in relation to national measures and practices in more than 50 cases to date. National governments, in particular the Polish government since most preliminary ruling requests have originated from Polish courts, have challenged both the jurisdiction of the Court and the admissibility of each of the preliminary ruling requests on essentially the same grounds mentioned above.
- In response, the Court reiterated the key guiding principles it has developed since its *ASJP* judgment: (i) the second subparagraph of Article 19(1) TEU seeks to ensure that the **national system of legal remedies** established by each Member State guarantees effective judicial protection in the fields covered by EU law while Article 47 CFR helps to ensure respect for the **right to effective judicial protection of any individual** relying, in a given case, on a right which he or she derives from EU law; (ii) The second subparagraph of Article 19(1) TEU is intended to apply to all national courts which may be called upon to rule on questions concerning the application or interpretation of EU law and are courts which come within the relevant national judicial system in the fields covered by EU law; (iii) Member States are required to comply with their obligations deriving from EU law when they exercise their exclusive competences, including when they adopt/enforce rules relating to the organisation of national judiciaries, such as rules governing the adoption of decisions appointing judges; rules relating to the judicial review that applies in the context of such appointment procedures; rules relating to the secondment of judges; rules relating to the retirement regime of judges; rules relating to the disciplinary and criminal liability of judges, including the disciplinary liability of judges for failure to comply with the decisions of the national constitutional court; rules relating to the personal liability of judges in the event of judicial error; rules governing the composition of panels hearing cases in matters of corruption and fraud; rules preventing judges from making references to the Court of Justice or to give one last example, rules preventing courts to disapply national provisions even where these provisions violate the Court of Justice's judgments.
- At this stage, **many more examples of successful reliance on the second subparagraph of Article 19(1) TEU can be outlined than the number of cases where the Court held a national request for a preliminary ruling inadmissible for lack of jurisdiction.** More examples can be found where the Court found *specific* questions inadmissible on different grounds such as the hypothetical nature of the question submitted to it. However, this is in no way specific to the rule of law preliminary ruling requests this study focuses on. There are nonetheless several examples of national requests for a preliminary ruling found inadmissible

on account of the lack of a connecting factor between the disputes pending before the referring courts and the second subparagraph of Article 19(1) TEU to which the questions submitted by the referring courts relate. In this context, the Court has furthermore clarified that while the mere prospect of being the subject of disciplinary proceedings as a result of making a reference, or deciding to maintain that reference after it was made, is incompatible with EU law, national disciplinary action against a national referring judge does not make the reference automatically admissible as a matter of EU law.

- The national requests for a preliminary ruling which the Court of Justice has found admissible have, in turn, enabled the Court to **clarify the type of national measures which are precluded by the second subparagraph of Article 19(1) TEU** (non-exhaustive list): (i) **legislative rules** which confer exclusive jurisdiction on a court which is not an independent and impartial tribunal regarding cases concerning the application of EU law; (ii) **legislative amendments** such as the amendments to the Polish Law on the National Council of the Judiciary which have the effect of removing effective judicial review of that council's decisions proposing candidates for the office of judge at the Supreme Court to the President of the Republic; (iii) **national provisions** relating to the organisation of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence; (iv) **national legislation** which prevents national ordinary courts to disapply of their own motion a national provision which they consider, in the light of a judgment of the Court of Justice, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU; (v) **national rules** under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability; (vi) **national rules or a national practice** under which a national judge may incur disciplinary liability on the ground that he/she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned.
- **While the material scope of application of the second subparagraph of Article 19(1) TEU is broader than the rest of EU law**, and in particular the right to effective judicial protection under Article 47 CFR, **the scope of Article 19(1) TEU is not boundless**. To borrow from CJEU Judge Sacha Prechal, this provision may be understood as "an institutional provision" primarily concerned with guaranteeing that all national courts meet the requirements of effective judicial protection considering that the independence of national judges is of fundamental importance for the EU legal order. **Its main added value is to trigger the application of EU effective judicial protection requirements in respect of any national court which may be called upon to interpret and apply EU law.**
- In examining the compatibility of national measures or practices relating, for instance, to judicial appointments, the removal of judges from office, their retirement age, the disciplinary regime applicable to them, the secondment or transfer of judges with EU effective judicial protection requirements, the Court of Justice – to quote CJEU President Lenaerts – "does not seek to redesign national judiciaries, as that remains an exclusive competence of the Member States", but requires compliances with fundamental principles of EU law which are themselves enshrined in ECHR law and in the national law of each of the EU Member States such as the principle of judicial independence.
- Considering the growing and persistent failure by some Members States to implement domestic, CJEU and ECtHR judgements – a phenomenon which is contributing to the erosion

of the rule of law as observed by the European Parliament in 2022 – it is recommended that the Parliament continues to demand from the Commission the inclusion of clear **data on non-compliance with CJEU judgments in the Commission's Annual Rule of Law Report (ARoLR)**. This would avoid the puzzling situation where a brief – but not yet sufficient – overview of Member States' track record of (non)compliance with leading judgments of ECtHR is provided while no similar overview is provided in respect of CJEU judgments and orders. In addition, it is recommended that the Parliament continues to request the Commission to **justify the absence of any enforcement action when "concerns", serious or otherwise, are mentioned in the ARoLR**, especially in respect of countries subject to Article 7 proceedings and/or in a situation where national authorities, including national courts, captured or otherwise, explicitly indicate their refusal to comply with CJEU judgments and/or orders.

"Where a Member State adopts measures that undermine the independence of national courts, the EU judicial architecture is compromised and so is the rule of law within the EU"

CJEU President Koen Lenaerts, 17 February 2023¹

1. INTRODUCTION

1.1. Background: EU's Rule of Law crisis

The EU has been facing a serious and sustained deterioration of the rule of law in some of its Member States for more than a decade.² In the absence of prompt and decisive reactions to this top-down and deliberate process of capture and/or dismantlement of all checks and balances, and in particular national judiciaries,³ **the EU is no longer facing a rule of law crisis but an autocracy crisis**, with the EU's rule of law crisis a core element of this broader autocracy crisis.⁴

The serious and sustained deterioration of the rule of law has not, of course, escaped the attention of the President of the Court of Justice of the EU (CJEU). In January 2020, at the occasion of the swearing-in ceremony of the new President and Members of the European Commission, President Lenaerts stressed the "proliferation of cases, particularly requests for a preliminary ruling before the Court" due to "concerns regarding respect for the rule of law, democracy and fundamental rights and freedoms" in "several Member States".⁵ In November 2021, in the absence of any improvement and, on the contrary, increasing open and deliberate disregard for the rulings of the CJEU, President Lenaerts delivered an unprecedented public warning:

The authority of the Court of Justice has been challenged in various Member States, as has the primacy of EU law, not only by politicians and the press, but also before and even by national courts, including certain constitutional courts. This is an extremely serious situation and it leaves the Union at a constitutional crossroads. I believe it is no exaggeration to say that its foundations as a Union based on

¹ K. Lenaerts, "The Rule of Law and the Constitutional Identity of the European Union", *speech* delivered by the president of the CJUE on 17 February 2023 at the conference organized by the Bulgarian Association for European Law in Sofia, published on 5 March 2023: <https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/>.

² For further analysis and references, see L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022.

³ For a broader political analysis on why authoritarian populist actors actively seek to undermine judicial independence and how they justify this, see J.-W. Muller, "Enemies of the People: Populism's Threat to Independent Judiciaries" in D. Giannouloupoloulos and Y. McDermot (eds), *Judicial Independence Under Threat* (Proceedings of the British Academy, Oxford University Press, 2022), pp. 27-28: "attacks on judicial independence are ... part of the logic of populism itself. Populists claim that only they represent the people, with the consequences that whatever is (or can be construed as) criticism from non-elected, independent institutions gets dismissed as illegitimate [...] However, this should not lead us to expect that populists in power will necessarily [...] dispense with constitutional courts and a nominal commitment to the independence of judges" as populist art of governance includes various ways of faking constitutionalism – which is to say: a façade of judicial institutions co-exists with populists in fact maximising opportunities to exercise arbitrary power in the name of a homogenous, virtuous people."

⁴ R.D. Kelemen, "The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools" (2023) 45 *Journal of European Integration* 223.

⁵ CJEU, Address by the President, Mr Lenaerts, annex to press release No 1/2020 "The President and Members of the European Commission give a solemn undertaking before the Court of Justice of the European Union", 13 January 2020.

the rule of law **are under threat and that the very survival of the European project in its current form is at stake.**⁶

A few months later, the President of the European Court of Human Rights (ECtHR), delivered an equally stark warning after mentioning the increasing number of judgments concerning judicial independence, in particular in respect of Poland, which show a worrying regression in the rule of law:

The rule of law is based on a very simple and important premise: those who are entrusted with wielding governmental power must themselves be circumscribed by the law and it is the role of the courts to state what the law is if a dispute arises [...] Europe where sustained public expressions of hostility or outright refusal to abide by court judgments are commonplace; A Europe where judges are simply unable to do their jobs independently and impartially for fear of reprisals or attacks resulting in unfettered governmental power: **This is a Europe in which the rule of law is at risk of disappearing.** This is a Europe in which we will no longer be free, as recent events have once again shown us.⁷

After a long period of denial, there has been an increasing public acknowledgement by leading political actors or officials of the seriousness of the danger posed by what may be described as **rule of law backsliding, erosion or regression**. To give two examples from 2022, President von der Leyen, in her latest State of the Union Address spoke of the need to “fight for our democracies” and of the “Commission's duty and most noble role to protect the rule of law.”⁸ A few months earlier, the Council of Europe Commissioner for Human Rights alerted us to the “erosion of the rule of law in a growing number of our member states” and the “existential threat to the Convention system” which flows from new “situations in which a High Contracting Party violates the right to individual applications or refuses to recognise the binding nature of judgments and the obligation to execute them.”⁹

In Poland, arguably the most extreme case of rule of law backsliding in the EU,¹⁰ the situation has deteriorated to unprecedented levels with national judges seeking to uphold the rule of law routinely subject to harassment in the form inter alia of arbitrary disciplinary measures and national, CJEU and ECtHR rule of law related judgments and orders routinely disregarded by authorities.¹¹ This, in turn, led the Secretary General of the Council of Europe to formally remind Polish authorities that Poland is under a strict obligation to execute the judgments of the ECtHR in a report adopted under the special procedure laid down in Article 52 ECHR published on 9 November 2022.¹² In the same report, in an extraordinary finding, the Secretary General of the Council of Europe was forced to conclude that the right to a fair trial by an independent and impartial tribunal established by law to everyone should be

⁶ K. Lenaerts, “Constitutional relationships between legal orders and courts within the European Union”, FIDE 2021, XXIX FIDE Congress, 4 November 2021: https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony_-4-November-2021_Koen-Lenaerts.pdf.

⁷ Speech by Robert Spano, President of the European Court of Human Rights, Solemn Hearing for the Opening of the Judicial Year, 24 June 2022: https://www.echr.coe.int/Documents/Speech_20220624_Spano_JY_ENG.pdf.

⁸ 2022 State of the Union Address by President von der Leyen, SPEECH/22/5493, 14 September 2022.

⁹ Speech by Dunja Mijatović, Council of Europe Commissioner for Human Rights, Solemn Hearing for the Opening of the Judicial Year, 24 June 2022: https://www.echr.coe.int/Documents/Speech_20220624_Mijatovic_JY_ENG.pdf.

¹⁰ 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. This is not to suggest that the overall rule of law situation in Hungary is in any way better. See e.g., I. Cameron, *The European Court of Human Rights and Rule of Law Backsliding* (Stockholm: SIEPS, 2023:4), p. 13: “The Polish government has drawn considerable attention to itself because its measures have been so blatant and its attitude so uncompromising but the situation of the rule of law in Hungary is probably worse. The independence of the whole court system in Hungary is in considerable doubt”.

¹¹ L. Pech and J. Jaraczewski, “Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations”, *CEU DI Working Paper* 2023/02: <https://democracyinstitute.ceu.edu/articles/laurent-pech-jakub-jaraczewski-systemic-threat-rule-law-poland-updated-and-new-article-71>.

¹² Council of Europe, Report by the Secretary General under Article 52 of the ECHR on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, SG/Inf(2022)39, 9 November 2022.

considered, in essence, systematically violated due to the actions of the irregularly composed and presided body formally known as Poland's Constitutional Tribunal:

As a result of the findings of unconstitutionality in the judgments K 6/21 and K7/21 of the Constitutional Court, the European Court's competence as established in Article 32 of the Convention was challenged and the implementation of Article 6, paragraph 1 of the Convention – as interpreted by the European Court in the cases of *Xero Flor w Polsce sp. z o.o.*, *Broda and Bojara, Reczkowicz, Dolińska-Ficek and Ozimek* and *Advanced Pharma sp. z o.o.* – has so far not been carried out. **The ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is not, at this stage, fulfilled.**¹³

This situation, unprecedented for a Member State of the EU, has created, in turn, a threat to the future efficiency of the ECHR system according to the Secretary General of the Council of Europe. However, **there is still widespread denial at the level of the Commission and the European Council/Council of the EU regarding the extent of the damage done to date to judicial independence and the right to effective judicial protection** in some EU Member States. There is a similar denial, deliberate or otherwise, regarding the extent to which an increasing number of EU Member States have ceased to be liberal democracies, and in one case at least, ceased to be a democracy *tout court*, a damning development considering EU membership requirements which has been recognised by the Parliament but not by the Commission and the Council.¹⁴

One may refer in this respect to the annual democracy reports published by the V-DEM Institute (University of Gothenburg) and which have repeatedly identified Hungary and Poland as being “among the top autocratizers in the world over the last decade”, with Hungary turning into an electoral autocracy in 2018.¹⁵ In addition, these reports show that emerging backsliding patterns in a number of EU Member States with Greece, for instance, being downgraded from liberal to electoral democracy in 2022” due to “a gradual deterioration of institutional checks and balances that are core to the principle of liberal democracy and ensure that the executive is constrained,”¹⁶ whereas some EU Member States such as Romania and Bulgaria having never been able to become liberal democracies post EU accession.¹⁷

¹³ Ibid., para. 29.

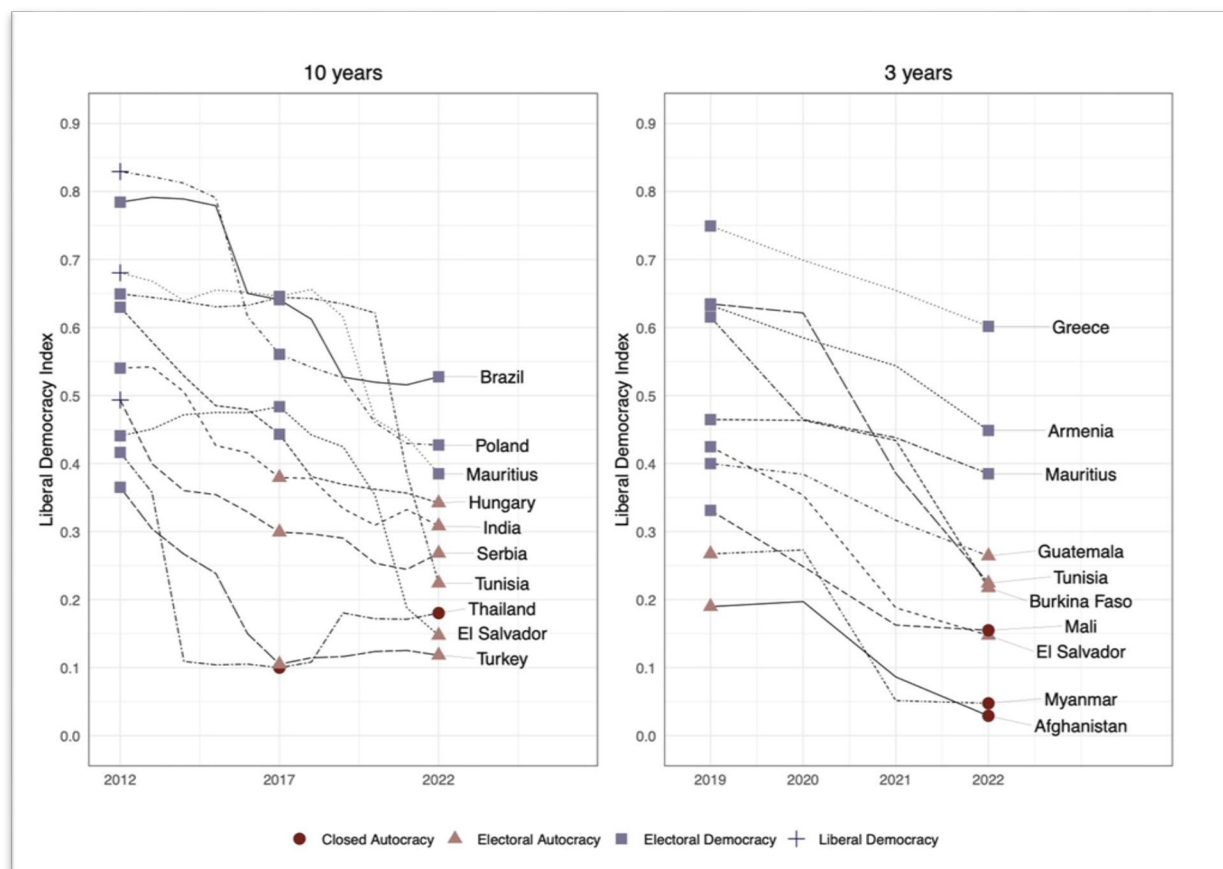
¹⁴ In September 2022, for the very first time, the Parliament referred to a “breakdown in democracy, the rule of law and fundamental rights” which has turned Hungary “into a hybrid regime of electoral autocracy”: See resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P9_TA(2022)0324, para. 2. The day before the Parliament did so, the monitoring committee of the Parliamentary Assembly of the Council of Europe adopted a report concluding that long-standing issues pertaining to the rule of law and democracy in Hungary “remain largely unaddressed” noting inter alia that the current electoral framework no longer ensures a level playing field conducive to fair elections. Council of Europe, PACE, “long-standing issues pertaining to the rule of law and democracy in Hungary “remain largely unaddressed”, says PACE committee”, 14 September 2022: <https://pace.coe.int/en/news/8807/long-standing-rule-of-law-and-democracy-issues-in-hungary-remain-largely-unaddressed-says-pace-committee>.

¹⁵ V-Dem Institute, *Autocratization Changing Nature. Democracy Report 2022*, March 2022, p. 25.

¹⁶ V-Dem Institute, *Democracy Report 2023: Defiance in the Face of Autocratization*, March 2023, p. 17.

¹⁷ V-Dem Institute distinguishes between four types of regimes: Closed and Electoral Autocracies, and Electoral and Liberal Democracies.

Figure 1: Top 10 autocratising countries in the world since 2012 (10-years v 3-years)



Source: V-Dem Institute, *Democracy Report 2023: Defiance in the Face of Autocratization*, p. 23.

1.2. Impact: Growing number of cases

CJEU and ECtHR data reflect the **unprecedented backsliding** in the rule of law which has been taking place in some EU Member States and the concomitant **growing and unprecedented refusal to comply** not only with national but also European judgments and orders.¹⁸

As regards the CJEU, one may refer to the sustained increase in the number of national requests for a preliminary ruling lodged with the European Court of Justice since the Court clarified in 2018 in the case of *Associação Sindical dos Juizes Portugueses (ASJP)* that 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") imposes a *general and justiciable* obligation on every Member State, not only to *guarantee* but also to *maintain* the independence of any national courts and tribunals which may be called upon to rule on questions relating to the application or interpretation of EU law.¹⁹

¹⁸ For a transversal overview of the CJEU rule of law backsliding related case law, see L. Pech and D. Kochenov, *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 Cases* (Stockholm: SIEPS, 2021:3). For a similar overview but in relation to the ECtHR case law, see I. Cameron, *The European Court of Human Rights and Rule of Law Backsliding* (Stockholm: SIEPS, 2023:4).

¹⁹ Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

As of 1 March 2023, **more than 50 national requests for a preliminary ruling** raising questions directly related to the potential incompatibility of national measures with the principle of effective judicial protection have been lodged with the Court following its *ASJP* judgment, with most of them originating from Polish and Romanian courts. By contrast, the Commission has made a very parsimonious use of its infringement powers (Article 258 TFEU), even when faced with manifest and systemic violations of the Court of Justice's rule of law-related judgments.²⁰ The Commission's reluctance to launch infringement actions to defend the rule of law and, in particular, national judges seeking to uphold EU rule of law requirements, has emerged in a broader context where the Commission appears to have prioritised reliance on "soft instruments" to bring about compliance not only in the rule of law area but in all areas.²¹ The Commission did however lodge a **total of 5 infringement actions** with the Court of Justice in relation to Poland's rule of law crisis as this study will outline.

This arguably "too little, too late" enforcement approach by the Commission has resulted in shifting de facto the problem to the ECtHR which is now facing an unprecedented and growing number of applications due to the Commission's failure to legally deal with a number of key aspects of Poland's rule of law crisis such as the systemic dysfunction in judicial appointments procedure due to the involvement of an unconstitutional body lacking any independence since 2018.²² As of 16 February 2023, **there are 323 applications pending before the ECtHR relating to Poland's rule of law crisis**, with more to be expected as these applications mostly relate to changes made to the organisation of Poland's judiciary under laws that mainly entered into force in 2017 and 2018. **More than 100 of these applications have been communicated to the Polish government** with the ECtHR having decided a total of 10 applications on the merits to date. In addition, in yet another unprecedented development, the Court has received a total of **60 requests for interim measures** from Polish judges in 29 cases concerning the disciplinary and waiving of judicial immunity cases against them and granted these requests in 17 cases.²³ In addition to not complying with ECtHR's rule of law judgments, Polish authorities have more recently also began refusing to comply with ECtHR's interim measures and justified this manifest violation of their legal obligations on account of the alleged unconstitutionality of the measures.²⁴

1.3. Scope of study

This study will solely focus on the Court of Justice's case law (as of 1 March 2023) with the primary aim of explaining the **scope of its jurisdiction over national measures relating to the organisation of national judiciaries**, including national measures targeting specific courts such as a national supreme court or judges, either individually or as a group.

To explain the Court of Justice's jurisdiction, this study will first provide a general overview of the legal situation post Lisbon Treaty (Section 2) as regards the enshrinement of the rule of law in the Treaties, how it has been defined in EU law and the extent of the Court's jurisdiction under the exceptional procedure laid down in Article 7 TEU; the infringement procedure laid down in Article 258 TEU and the

²⁰ For further analysis and examples, see L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022, p. 82 et seq.

²¹ R.D. Kelemen, "The European Union's failure to address the autocracy crisis", op. cit.

²² See generally L. Pech and J. Jaraczewski, "Systemic Threat to the Rule of Law in Poland", op. cit.

²³ On this important new development, see M. Fisicaro, "Safeguarding Judicial Independence (and Subsidiarity) Through Interim Measures: The New ECtHR's Strategy at the Height of the Polish Constitutional Crisis" (2022) 16(3) *Diritti umani e diritto internazionale* 637.

²⁴ ECtHR, "Non-compliance with interim measure in Polish judiciary cases", Press release, ECHR 053 (2023), 16 February 2023.

preliminary ruling procedure under Article 267 TFEU. Special attention will be paid to the situation pre and post the Court's seminal *ASJP* judgment of 27 February 2018.²⁵ This judgment is indeed crucial as it confirmed that **although the organisation of justice in the Member States falls within the competence of those Member States, Member States are still required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU** which requires Member States to provide remedies sufficient to ensure effective judicial protection for individuals in the field covered by EU Law.²⁶

As this study will show, the second subparagraph of Article 19(1) TEU has since become the main vehicle through which national judiciary-related measures have been brought to the Court of Justice's attention either via direct infringement actions (Section 3) or via national requests for a preliminary ruling (Section 4).²⁷ This study will conclude with a general overview of the Court of Justice's jurisdiction five years post *ASJP* judgment (Section 5).

²⁵ Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

²⁶ *Ibid.*

²⁷ EU annulment actions, by definition, may only be used to seek the annulment of EU measures and not national measures, which is why the study does not examine them. However, the rule of law situation in a Member State may become a relevant factor in the context of an EU annulment action as the (for now unique) Case T-791/19, *Sped-Pro v Commission*, EU:T:2022:67, demonstrates. In this case, the applicant submitted that the Commission infringed its right to effective judicial protection, guaranteed by Article 2 TEU, read in conjunction with the second paragraph of Article 19(1) TEU and Article 47 of the Charter, when it failed to take account of the systemic or generalised deficiencies in the rule of law in Poland "and, in particular, the lack of independence of the Polish competition authority and the national courts with jurisdiction in that area" (para. 71). The General Court did agree "that compliance with the requirements of the rule of law is a relevant factor that the Commission must take into account, for the purposes of determining which competition authority is best placed to examine a complaint" (para. 92) and annulled the Commission's decision to reject the applicant's complaint.

2. OVERVIEW OF THE COURT OF JUSTICE'S JURISDICTION REGARDING NATIONAL JUDICIARY-RELATED MEASURES POST LISBON TREATY

After an overview of the relevant provisions of EU primary law and offering an outline of the Court of Justice's jurisdiction over national judiciary-related measures or practices post Lisbon Treaty but prior to the Court's *ASJP* judgment of 27 February 2018, this Section will outline the seminal nature and practical implications of this judgment when it comes to the scope of application of the second subparagraph of Article 19(1) TEU which, as previously noted, requires Member States to provide remedies sufficient to ensure effective judicial protection for individuals in the field covered by EU Law.

2.1. Overview of Treaty Framework

With respect to the enshrinement of the rule of law in the EU Treaty framework, one may first recall the absence of any explicit reference to the rule of law in the original founding treaties. The 1951 European Coal and Steel Community Treaty and the 1957 European Economic Community Treaty did however encapsulate the core meaning of the rule of law – “the reviewability of decisions of public authorities by independent courts”²⁸ – in their provisions describing the jurisdiction of the European Court of Justice.²⁹

The EU Treaties have since been revised multiple times, most recently by the 2007 Lisbon Treaty, with the result that EU law has seen a “widening” (in the sense of the increasing number of references in multiple areas) and a “deepening” (in the sense of the adoption of new mechanisms) of the EU Treaty framework in respect of the rule of law which, one may further add, tends to be systematically referred to alongside democracy and respect for human rights.

2.1.1. The Rule of Law in the EU Treaties³⁰

Post Lisbon Treaty, the Treaty on European Union (TEU) includes multiple, explicit or implicit, references to the rule of law. When it comes to explicit references, one may refer to the following provisions (bold added):

- Preamble to the TEU: “DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person [...] and **the rule of law**”; “CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of **the rule of law**”
- Article 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, **the rule of law** and respect for human rights [...]”
- Article 21(1) TEU: “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it

²⁸ F. Jacobs, *The sovereignty of law: The European way* (The Hamlyn Lectures 2006, Cambridge University Press, 2007), p. 35.

²⁹ See e.g. Article 164 EEC Treaty: “The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.”

³⁰ For a comprehensive analysis, see L. Pech, “The Rule of Law” in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 3rd ed, 2021), 307-338.

seeks to advance in the wider world: democracy, **the rule of law**, the universality and indivisibility of human rights and fundamental freedoms [...]"

- Article 21(2) TEU: "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] consolidate and support democracy, **the rule of law**, human rights and the principles of international law"

In addition, the TEU implicitly refers to the rule of law in several provisions via the notion of EU values and references – but not always – to Article 2 TEU (bold added):

- Article 3 TEU: "The Union's aim is to promote [...] **its values**"
- Article 7(1) TEU: "[...] the Council [...] may determine that there is a clear risk of a serious breach by a Member State of **the values** referred to in Article 2"
- Article 7(2) TEU: "The European Council [...] may determine the existence of a serious and persistent breach by a Member State of **the values** referred to in Article 2"
- Article 8 TEU: "The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on **the values** of the Union"
- Article 49 TEU: "Any European State which respects **the values** referred to in Article 2 and is committed to promoting them may apply to become a member of the Union"

The TEU also includes a provision explicitly referring a core component of the rule of law, i.e., **the principle of effective judicial protection**, in 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". While this provision does not explicitly refer to the rule of law, the Court of Justice has held that **the second subparagraph of Article 19(1) TEU "gives concrete expression to the value of the rule of law stated in Article 2 TEU"**.³¹

In relation to Article 2 TEU specifically, the Court of Justice, sitting as a full court, stressed the following aspects in two seminal judgments of 16 February 2022³² relating to the legality of the EU's Rule of Law Conditionality Regulation:³³ (i) The values contained in Article 2 TEU are shared by the Member States; (ii) These values define the very identity of the EU as a common legal order; (iii) These values are given concrete expression in principles containing legally binding obligations for the Member States; (iv) The EU must be able to defend Article 2 TEU values within the limits of its powers as laid down by the Treaties.³⁴ In the same two judgments, as regards the rule of law specifically, the Court of Justice referred to it as **"a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order"**.³⁵

³¹ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 32.

³² See Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98. For a brief account, see L. Pech, "No more excuses – the European Court of Justice greenlights the rule of law conditionality mechanism" (2022) 1 *European Court of Auditors Journal* 140.

³³ Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union Budget [2020] OJEU L 433 I/1.

³⁴ Case C-156/21, paras 127 and 232, and Case C-157/21, paras 145 and 264.

³⁵ Case C-156/21, para. 128 and C-157/21, para. 146.

The EU Charter of Fundamental Rights (CFR) also contains explicit references to the rule of law in addition to protecting core rights associated with the concept. To begin with, the preamble to the CFR provides, *inter alia*, the EU “is based on the principles of democracy and the rule of law”. In addition, certain aspects of the rule of law are also protected by Articles 47 to 50 CFR (Title VI of the CFR entitled “Justice”), which guarantee, respectively, the right to an effective remedy and the right to a fair trial; the presumption of innocence and rights of the defence; the principles of legality and proportionality of criminal offences and penalties; and the right not to be tried or punished twice for the same criminal offence. One may stress in this respect that **Article 47 CFR and Article 19 TEU similarly “guarantee, *inter alia*, the right to an effective remedy and the right to an independent and impartial tribunal previously established by law, as regards the protection of the rights and freedoms guaranteed by EU law”**.³⁶ As this study will show, the scope of application of the second subparagraph of Article 19(1) TEU is however much broader as the second subparagraph of Article 19(1) TEU, which refers to the “fields covered by Union law”, may apply irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) CFR.

Finally, while the EU Treaty framework does not include a single and all-encompassing definition – not an unusual trait by comparison to national constitutional practices³⁷ – the EU’s co-legislators did provide for one when they adopted the Rule of Law Conditionality Regulation on 16 December 2020:

‘the rule of law’ refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.³⁸

In addition, the EU’s co-legislators outlined **the core meaning of the rule of law** as follows, an understanding which, one may add, reflects a broad consensus in the European legal space:³⁹

The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights [...] under the control of independent and impartial courts.⁴⁰

As stressed by the Court of Justice, while Regulation 2020/2092 does not set out in detail the principles of the rule of law that it mentions in the definition quoted above, this does not mean the definition would be excessively vague. Indeed, these principles have “been the subject of extensive case-law”.

This means that **no Member State can therefore claim not to be “in a position to determine with sufficient precision the essential content and requirements flowing from each” of the rule of law principles listed in the Regulation**.⁴¹ Likewise, **no Member State can (seriously) claim that the “are**

³⁶ C-156/21, para. 157 and Case C-157/21, para. 193.

³⁷ For further analysis and references, see L. Pech, “The rule of law as a well-established and well-defined principle of EU Law” (2022) 14 *Hague Journal on the Rule of Law* 107.

³⁸ Article 2 of Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union Budget [2020] OJEU L 433 I/1.

³⁹ See L. Pech, “The rule of law as a well-established and well-defined principle of EU Law”, *op. cit.*

⁴⁰ Recital 3 of Regulation 2020/2092, *op. cit.*

⁴¹ Case C-156/21, para. 240.

of a purely political nature and that an assessment of whether they have been respected cannot be the subject of strict legal analysis.”⁴²

In addition, the principles mentioned in the definition of the rule of law provided in the EU Conditionality Regulation have their source in common values which are “recognised and applied by the Member States in their own legal systems”.⁴³ As recently recalled by the CJEU President, writing extra-judicially, it follows that **Article 2 TEU values “are not unilaterally imposed on the Member States”** by Brussels or by Luxembourg”. On the contrary, they are the consequence of a ‘bottom-up’ approach, as they stem from the constitutional traditions common to the Member States.”⁴⁴

As regards judicial independence specifically, the CJEU President also helpfully recalled that **“respect for judicial independence is by no means an invention of the Union**. It is part of the democratic heritage of all Union citizens, as attested by the references to an independent judiciary in the Constitutions of all Member States of the EU, without exception.”⁴⁵ In this respect, it is worth stressing that “the EU judicial architecture includes not only the EU Courts (the Court of Justice and the General Court) but also national courts, which are in fact an essential building block of the EU’s constitutional structure.”⁴⁶ And given **“the central role of national courts in the EU’s constitutional structure and in applying and enforcing EU law in the Member States, judicial independence must be ensured in respect of each and every court within the national judicial systems”**.⁴⁷ A crucial point which shall be expanded in the rest of this Section.

2.1.2. Court of Justice’s jurisdiction over national judiciary-related measures or practices: Situation post Lisbon Treaty and pre *ASJP* judgment⁴⁸

According to the first subparagraph of Article 19(1) TEU, “The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed”. And according to 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”.

In line with Article 19(1) TEU, the CJEU has been conferred a wide jurisdiction not only as far as EU institutions are concerned but also EU Member States as the rule of law, to quote the current President of the CJEU, “means that neither the EU institutions nor the Member States are above EU law”.⁴⁹

As far as EU institutions are concerned, “since the entry into force of the Treaty of Lisbon, the Court enjoys jurisdiction *by default* with regard to all acts adopted by EU institutions, at least those which are intended to have legal effects. It follows that it is only when the Treaties lay down express exclusions

⁴² Ibid. A slightly different phrasing is used in Case C-157/21, para. 203: “the Republic of Poland is wrong to claim that the principles mentioned in Article 2(a) of the contested regulation are solely political in nature and that the review of observance of them cannot be the subject of a strictly legal assessment”.

⁴³ Case C-156/21, paras 236-237 and Case C-157/21, paras. 290-291.

⁴⁴ K. Lenaerts, “The Rule of Law and the Constitutional Identity of the European Union”, speech delivered by the president of the CJEU on 17 February 2023 at the conference organized by the Bulgarian Association for European Law in Sofia, published on 5 March 2023: <https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/>.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 32.

⁴⁹ K. Lenaerts, ‘Upholding the Rule of Law within the EU’ 2nd RECONNECT Conference (5 July 2019) report, 20, <https://reconnect-europe.eu/wp-content/uploads/2020/08/RECONNECT-GA-report-web.pdf>.

that the Court has no jurisdiction. For example, the first paragraph of Article 275 TFEU and Article 276 TFEU provide for such exclusions, in relation, respectively, to the common foreign and security policy and law and order operations carried out in the Member States.”⁵⁰ To put it differently and to borrow again from Advocate General Bobek, “under the Treaty of Lisbon, the default rule is uncompromisingly simple: unless the Treaty clearly and expressly excludes it, the Court has jurisdiction over all EU acts. Moreover, any such express exclusion is to be interpreted narrowly.”⁵¹

As far as Member States are concerned in relation to national measures or practices which may not be compatible with EU effective judicial protection requirements – this study's focus – the situation is more difficult to briefly explain. As a preliminary point, one must first stress that “numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, **grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State**”.⁵² According to the Court of Justice, this means that the rule of law, as one of the values laid down in Article 2 TEU, can be protected under different EU procedures by different EU institutions and not only under the exceptional procedure laid down in Article 7 TEU and which will be outlined below. However, and this is important, this does *not* mean that the Court of Justice's jurisdiction is identical under each EU procedure – if at all relevant when it comes to the multiple “soft” tools developed in the past decade⁵³ – and that any national measure or practice, which may be understood as potentially violating EU rule of law principles, may be reviewed by the Court of Justice.

As will be further explained below, while the scope of Article 7 TEU is not confined to areas covered by EU law, the Court of Justice's jurisdiction is strictly limited under this provision. As regards the two standard or ordinary procedures laid down in the Treaties – the infringement procedure (Article 258 TFEU); the preliminary ruling procedure (Article 267 TFEU) – infringement actions may be lodged with the Court only in relation to national measures or practices which fall within the scope of EU law and violate specific EU law obligations whereas the Court has jurisdiction to give a preliminary ruling under Article 267 TFEU *only* where a national legal dispute comes within the scope of EU law.

As this study's next section will detail, the Court of Justice has since confirmed in its seminal *ASJP* judgement of 27 February 2018⁵⁴ that the second subparagraph of Article 19(1) TEU (principle of effective judicial protection) may catch national measures or practices which do not fall within the (traditionally understood) scope of application of EU law. Before explaining the importance and consequences of this ruling, the situation post Lisbon Treaty and pre *ASJP* judgment will be summarised below.

(i) The Court of Justice's extremely limited jurisdiction under the exceptional procedure laid down in Article 7 TEU

⁵⁰ Opinion of Advocate General Bobek of 3 December 2020 in Case C-650/18, *Hungary v Parliament*, EU:C:2020:985, para. 35.

⁵¹ *Ibid.*, para. 36.

⁵² Case C-156/21, para. 159 and Case C-157/21, para. 195.

⁵³ The Court of Justice has no jurisdiction over EU “soft law” mechanisms such as the Council's annual rule of law dialogue, the Commission's Justice Scoreboard or the Commission's Annual Rule of Law Report do not provide for the adoption of any legally binding measures. This does not mean, however, that findings to be found in EU reports or indeed, non-EU reports (e.g. Venice Commission opinions), cannot be referred to by parties or national courts in support of their positions (parties) or their requests for a preliminary ruling (courts). For further analysis, see L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022.

⁵⁴ Judgment of 27 February 2018 in Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 32.

To begin with the exceptional procedure laid down in Article 7 TEU, **the Court of Justice's jurisdiction is limited** by another provision of the Treaty (Article 269 TFEU) whereby the Court can only review the procedural stipulations contained in this provision and only in relation to the legality of acts adopted by EU institutions.⁵⁵ The Court therefore lacks jurisdiction to examine national measures or practices which may be found by the Council to amount to a clear risk of a serious breach by a Member State of the values referred to in Article 2 (Article 7(1) TEU) or by the European Council to amount to a serious and persistent breach by a Member State of the values referred to in Article 2 (Article 7(2) TEU). This may be understood as a consequence of the specific, political nature⁵⁶ and the unrestricted scope of the procedure as **Article 7 TEU is understood as covering any national measure or practice, including outside of the "normal" scope of application of EU law:**

The scope of Article 7 is not confined to areas covered by Union law. This means that the Union 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. [...] The fact that Article 7 of the Union Treaty is horizontal and general in scope is quite understandable in the case of an article that seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction.⁵⁷

One of the unique features of the Article 7's preventive and sanctioning mechanisms is therefore that they may be activated by relevant EU institutions to monitor and assess actions/inactions of national authorities in any area, including in areas not connected to EU law in any way.⁵⁸

This also explains and justifies the wide scope of the Commission's ARoLR, the most recent monitoring tool introduced at EU level and which looks at issues beyond the scope of application of EU law *stricto sensu* so as to better enable the Commission detect at an early stage any national systemic threat to the rule of law which would justify the activation of Article 7(1) TEU.

(ii) The Court of Justice's jurisdiction under the infringement (Article 258 TFEU) and preliminary ruling (Article 267 TFEU) procedures

The Court's jurisdiction is not similarly restricted under the two standard or ordinary procedures: the infringement procedure (Article 258 TFEU) and the preliminary ruling procedure (Article 267 TFEU). **However, the scope of application of these procedures is much more limited than Article 7 TEU** as will be briefly shown below.

Under the infringement procedure (Article 258 TFEU), the Court of Justice has jurisdiction to find that a Member State has failed to fulfil its obligations under the Treaties. In practice, most infringement actions are brought by the Commission and if the Court finds a Member State to be in breach of its EU law obligations, the Member State must bring the failure to an end without delay. Compliance of

⁵⁵ The Court of Justice did however confirm that as a provision entailing a limitation on the general jurisdiction conferred by Article 263 TFEU (annulment action) on the Court to review the legality of acts of the EU institutions, Article 269 TFEU "must, therefore, be interpreted narrowly". See judgment of 3 June 2021 in Case C-650/18, *Hungary v European Parliament*, EU:C:2021:426, para. 31.

⁵⁶ Opinion of AG Bobek in Case C-650/18, op. cit., para. 77.

⁵⁷ Communication from the Commission, Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 15 October 2003, p. 5.

⁵⁸ To date, only the preventive arm of Article 7 TEU has been activated in respect of Poland and Hungary in December 2017 and September 2018 respectively. See L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022.

Member States with EU rule of law principles which impose legally binding obligations on them can therefore be reviewed by the Court via an action for failure to fulfil obligations (in short, an infringement action) brought by the Commission. In the face of increasingly sustained and systemic violations of EU rule of law principles, in particular judicial independence, the major legal problem until 2018 and the clarification provided by the Court in the *ASJP* judgment, has been **the Commission's narrow understanding of the scope of application of the infringement procedure**:

Action taken by the Commission to launch infringement procedures, based on Article 258 TFEU, has proven to be an important instrument in addressing certain rule of law concerns. But infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law.⁵⁹

In the same Communication, the Commission justified this stance with reference to the EU Charter of Fundamental Rights and noted that while it is "determined to use all the means at its disposal to ensure that the Charter is fully respected by the Member States", in particular Article 47 CFR (individual right to an effective remedy before an independent tribunal), the Commission can only do so "vis-à-vis Member State "only when they are implementing EU law" as set out explicitly in Article 51 of the Charter".⁶⁰ One may note in this respect that it is now well established that infringement actions may be solely based on one or more provisions of the Charter provided the national measure being challenged falls within the scope of EU law.⁶¹ In addition, the Court has made clear 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 mentioned in an Article 7(1) TEU's reasoned proposal.⁶²

Under the preliminary ruling procedure (Article 267 TFEU), the Court of Justice has jurisdiction to answer questions concerning the interpretation of EU law and/or the validity of all acts of the EU institutions referred to the Court by national courts. Once the Court issues its preliminary ruling, it is for national courts to apply the Court of Justice's preliminary rulings to the disputes pending before them. The Court of Justice's preliminary rulings are binding both on the referring courts, which must dispose of the cases pending before them in accordance with the Court's rulings, and all national courts before which similar issues are raised. However, and crucially, **the Court of Justice has no jurisdiction to decide national disputes and the Court can only answer a request for a preliminary ruling if EU law applies to the case in the main proceedings**.

In line with the situation regarding infringement actions, the legally binding nature of the EU Charter of Fundamental Rights post Lisbon Treaty did not expand the jurisdiction of the Court of Justice under Article 267 TFEU:

With regard to references for a preliminary ruling concerning the interpretation of the Charter of Fundamental Rights of the European Union, it must be noted that, under Article 51(1) of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing EU law. While the circumstances of such implementation can vary, it must nevertheless be clearly and unequivocally apparent from the request for a preliminary ruling that a rule of EU law other than the Charter is applicable to the case in the main proceedings. Since the Court has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law, any *provisions of the*

⁵⁹ Communication from the Commission, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014, p. 5

⁶⁰ Ibid, p. 5, fn. 14.

⁶¹ M. Bonelli, "The "NGOs case": on How to Use the EU Charter of Fundamental Rights in Infringement Actions", 46(2) European Law Review (2021) p. 258.

⁶² See Case C-619/18 *Commission v Poland* (Independence of the Supreme Court), EU:C:2018:1021, which is examined infra in Section 3 of this study.

*Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction.*⁶³ (emphasis in original)

As regards the key differences between the main task of the Court of Justice under Article 258 TFEU versus its main task under Article 267 TFEU, as regularly emphasised by the Court itself:

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 corresponding 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.⁶⁴

In response to an objection raised by the Polish government whereby a Maltese referring court would have allegedly circumvented Article 258 TFEU by asking the Court whether national legal provisions regarding the Maltese judiciary are compatible with EU law, the Court recalled that:

[A]lthough it is not the task of the Court, in preliminary-ruling proceedings, to rule upon the compatibility of provisions of national law with the legal rules of the European Union, the Court does, however, have jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it. It is for the referring court to carry out such an assessment, in the light of the guidance thus provided by the Court.⁶⁵

The Polish government's objection that an answer to the questions raised by the referring Maltese court under Article 267 TFEU would circumvent Articles 258 and 259 TFEU was therefore rejected.

To sum up, the traditional understanding of the infringement procedure is that it could only be used to challenge national measures or practices falling within the scope of EU law whereas the preliminary ruling procedure could only be used by national courts faced with a legal dispute which comes within the scope of EU law. **This traditional understanding has proved problematic in an era of increasing rule of law backsliding at Member State as many national measures seeking to undermine judicial independence in a systemic manner could be deemed, for the most part, to fall outside the scope of EU law.**

The Court of Justice addressed this problem in 2018 by holding that the principle of effective judicial protection laid down in the second subparagraph of Article 19(1) TEU includes a directly effective obligation to guarantee judicial independence at Member State level **and has a scope of application "broader than the rest of EU law"**.⁶⁶ The only exception is Article 7 TEU which, as outlined above, is not confined to areas covered by EU law but does not allow the Court to review national measures or practices which EU (political) institutions have identified as amounting to a systemic threat or violation of specific or all Article 2 TEU values.

One may note that a recent development suggests that another, arguably bigger **sea change may be around the corner but this time not merely in relation to the rule of law but to all EU values**.⁶⁷

⁶³ CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2019] OJEU C 380/1, para. 10.

⁶⁴ Case C-896/19, *Repubblika v Il-Prim Ministru*, EU:C:2021:31, para. 29. The Court's judgment in this case is examined infra in Section 4 of this study.

⁶⁵ Ibid., para. 30.

⁶⁶ M. Bonelli, "Infringement Actions 2.0: How to Protect EU Values before the Court of Justice" (2022) 18 *ECLR* 30, p. 36.

⁶⁷ See L. Spieker, "Berlaymont is back: The Commission invokes Article 2 TEU as self-standing plea in infringement proceedings over Hungarian LGBTIQ rights violations", *EU Law Live*, 22 February 2023: <https://eulawlive.com/op-ed-berlaymont-is-back-the-commission-invokes-article-2-teu-as-self-standing-plea-in-infringement-proceedings-over->

Indeed, for the very first time, in an infringement action brought on 19 December 2022 against Hungary, the Commission has relied on Article 2 TEU as a stand-alone plea in law. According to the Commission itself, by adopting the relevant piece of legislation banning LGBTIQ content, "Hungary has infringed Article 2 TEU".⁶⁸ Reliance on Article 2 TEU has been justified by the Commission on account of the **systematic nature** of the violation of several fundamental rights enshrined in the EU Charter (human dignity, freedom of expression and information, the right to respect of private life as well as the right to non-discrimination) and **the gravity** of these violations.⁶⁹ Until this action, and to simplify, the Commission's (orthodox) position was that Article 2 TEU does not contain sufficiently precise legal obligations to be used as a stand-alone plea in law in an infringement action notwithstanding academic calls for the Commission to adjust its approach to address the systemic dismantlement of checks and balances of the type we have seen in Hungary and Poland.⁷⁰

It is however important to stress that the Hungarian legislation is not deemed to fall within the scope of EU law on the mere basis of Article 2 TEU. Instead, reliance on Article 2 TEU is possible only because, to follow the Commission, the Hungarian legislation does not comply with several directives such as Directive 2010/13 on audiovisual media services. **Whether this action brought in December 2022 is a precursor to a more systemic infringement approach when faced with systemic violations of Article 2 TEU values remains however to be confirmed** and one may expect the Commission to wait for the Court of Justice's validation of this approach before pursuing it further. At this stage, one may just recall that the Court of Justice, sitting as a full court, has already and solemnly held that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".⁷¹

2.2. The Court of Justice's answer to national rule of law backsliding in ASJP⁷²

The Court's judgment of 27 February 2018 in *Associação Sindical dos Juizes Portugueses*, often informally referred to as the *ASJP* or *Portuguese Judges* judgment, may be viewed as the Court's first significant, albeit indirect, answer to the process of rule of law backsliding first witnessed in Hungary, and at the time of the Court's judgment, in full motion in Poland.⁷³ A few weeks before, the Commission had activated the preventive mechanism laid down in Article 7(1) TEU in respect of Poland, the very first time this mechanism was used in the history of EU law.⁷⁴

[hungarian-lgbtqi-rights-violations-by-luke-dimitrios-spieker/](#) and L. Kaiser, "A New Chapter in the European Rule of Law Saga? On the European Commission's attempt to mobilise Art. 2 TEU as a stand-alone provision", *VerfBlog*, 4 March 2023: <https://verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/>.

⁶⁸ Action brought on 19 December 2022 – *European Commission v Hungary* (Case C-769/22) [2023] OJEU C 54/16.

⁶⁹ European Commission, "Commission refers HUNGARY to the Court of Justice of the EU over violation of LGBTIQ rights", Press release, IP/22/2689, 15 July 2022.

⁷⁰ See K.L. Scheppele, D. Kochenov, 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 (2021) 39 *Yearbook of European Law* 3.

⁷¹ Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97, para. 232.

⁷² This Section borrows from L. Pech and D. Kochenov, *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 Cases* (Stockholm: SIEPS, 2021:3), p. 22 et seq.

⁷³ For a detailed overview of the EU institutions' (in)action with respect to Hungary and subsequently Poland, see L. Pech and K.L. Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

⁷⁴ For a detailed Article 7(1) TEU state of play up to date as of 1 January 2023, see L. Pech and J. Jaraczewski, "Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations", *CEU DI Working Paper* 2023/02:

As will be outlined below, the two most significant legal outcomes of the *ASJP* judgement are (i) the **Court's expansive interpretation of the scope of application of the second subparagraph of Article 19(1) TEU**, a provision introduced by the Lisbon Treaty⁷⁵ and which provides that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"; and (ii) the Court's interpretation of the material content of this provision from which the Court derived a **general and justiciable obligation for every Member State not only to guarantee but also to maintain the independence of any national courts and tribunals** which may be called upon to rule on questions relating to the application or interpretation of EU law.

2.2.1. Pre *ASJP*'s (unheard) calls

Prior to the Court's judgment in *ASJP*, a number of scholars called on the Commission to operationalise Article 2 TEU by connecting it to other provisions of the TEU such as Article 4(3) TEU and Article 19(1) TEU and use the latter provision to build infringement cases against Member States when they engage in the systemic undermining of judicial independence.⁷⁶ In 2016, building up on the scholarship of Professor Scheppele, Professor Kochenov and the present author argued for the combined use of these Treaty provisions so as to enable the Court's review of *national* breaches of the rule of law *beyond* the areas covered by the EU's *acquis* strictly understood:

[T]here is [...] no legal obstacle preventing the Commission from using the infringement procedure to simultaneously investigate a set of diffuse and/or cumulative breaches of EU values in conjunction with EU principles such as the duty of loyalty, which is enshrined in Article 4(3) TEU ... or the requirement that Member States 'shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' (Article 19(1) TFEU).⁷⁷

At the time, the Commission was however reluctant to rely on the second subparagraph of Article 19(1) TEU with the *ASJP* case providing a perfect illustration of the Commission's position. Indeed, in this case, both the Portuguese government and the Commission objected to both to the Court's jurisdiction and the admissibility of the questions submitted by the referring courts.

The objection to the Court's jurisdiction is the most interesting aspect as the Portuguese government and the Commission both submitted that the national legislation at issue in the main proceedings (i.e., a Portuguese law organising a transitional reduction in the salaries paid to public servants, including judges) was not a measure implementing EU law within the meaning of Article 51 CFR ("The provisions of this Charter are addressed [...] to the Member States only when they are implementing Union Law"), with the consequence that there is no need to interpret" neither Article 47 CFR nor Article 19(1) TEU.⁷⁸

<https://democracyinstitute.ceu.edu/articles/laurent-pech-jakub-jaraczewski-systemic-threat-rule-law-poland-updated-and-new-article-71>.

⁷⁵ In doing so, the Lisbon Treaty merely codified the Court's case law. See in particular Judgement of 25 July 2022 in 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 University Press, 2019).

⁷⁶ European Parliament Research Service, *An EU mechanism on democracy, the rule of law and fundamental rights*, Annex I (study by L. Pech et al at the request of the Impact Assessment Unit), PE 579.328, April 2016, p. 198.

⁷⁷ D. Kochenov and L. Pech, "Better late than never? On the European Commission's Rule of Law Framework and its First activation", (2016) 54 *JCMS* 1062, p. 1065. See also C. Hillion, "Overseeing the Rule of Law in the EU: Legal mandate and means" and K.L. Scheppele, "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 University Press, 2016).

⁷⁸ Opinion of Advocate General Saugmandsgaard Øe delivered on 18 May 2017 in Case C-64/16, EU:C:2017:395, para. 37.

On this matter, the opinion of Advocate General Saugmandsgaard Øe is also worth noting. As regards the Court's jurisdiction, the Advocate General was of the opinion that the Court has jurisdiction to provide an interpretation of both Article 19(1) TEU and Article 47 CFR. In relation to the former, the Advocate General submitted that the principle of effective judicial protection binds Member States "when the national courts are likely to exercise their judicial activity in areas covered by EU law, and therefore to act as European judges", which "may be the case of the judges affected by the legislation at issue in the main proceedings, in so far as they may be required to settle disputes falling within the scope of EU law, in which the possibility of making use of such remedies must be guaranteed".⁷⁹ In relation to Article 47 CFR, it would also be applicable as the Portuguese legislation constitutes an implementation of provisions of EU law within the meaning of Article 51 CFR.

As regards substance, the Advocate General's main conclusions were as follows: The purpose of the second subparagraph of Article 19(1) TEU are "primarily procedural in nature"⁸⁰ and the concept of effective judicial protection, within the meaning of the second subparagraph of Article 19(1) TEU, "must not be confused" with the principle of judicial independence and does not furthermore cover the right to a fair hearing before an independent court.⁸¹ According to the Advocate General, that the second subparagraph of Article 19(1) TEU cannot therefore be interpreted as enshrining "a general principle of EU law according to which the independence of judges sitting in all the courts of the Member States should be guaranteed".⁸² As will be shown below, the Court did not follow this interpretation as far as the substance of Article 19(1) TEU is concerned. The Court did however build on the Advocate General's point that the scope of application of Article 19(1) TEU is not constrained by Article 51 CFR as is Article 47 CFR.

2.2.2. The Court of Justice's answer in *ASJP*

Having found the request for a preliminary ruling admissible on the ground that it has been provided with sufficient information to enable it "to understand the reasons why the referring court seeks an interpretation of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter for the needs of the main proceedings",⁸³ the Court does not further address the issue of whether it has jurisdiction to answer this request for a preliminary ruling in the admissibility part of its judgment. Instead, the Court moves on the substance of the referred questions to address the respective scope of application of the second subparagraph of Article 19(1) TEU and Article 47 CFR and in doing so, indirectly clarifies why it has jurisdiction to answer questions relating to these two provisions.

The most crucial aspect of the judgment in this respect is the Court's reasoning 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".⁸⁴ In other words, **the scope of application of the EU principle of effective judicial protection under the second subparagraph of Article 19(1) TEU is broader than the scope of application of the EU right to an effective remedy and to a fair trial under Article 47 CFR.** Indeed, the second subparagraph of Article 19(1) TEU covers any national court or tribunal within the meaning of EU law which may rule as a court or tribunal on questions concerning

⁷⁹ Ibid., para. 41.

⁸⁰ Ibid., para. 63.

⁸¹ Ibid., paras. 64 and 66.

⁸² Ibid., para. 67.

⁸³ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 21.

⁸⁴ Ibid., para. 29.

the application or interpretation of EU law. **Any such court must meet the EU requirements of effective judicial protection such as judicial independence.** As aptly summarised by Matteo Bonelli and Monica Claes:

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 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'.⁸⁵

In the present instance, as the Portuguese Tribunal de Contas (Court of Auditors) may rule, as a court or tribunal within the meaning of EU law, on questions concerning the application or interpretation of EU law, it follows, according to the Court of Justice, that "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".⁸⁶

As regards the substance of the question referred, the Court replied that any national measure of a financial nature which, for instance, would specifically target national judges could be reviewed in light of Article 19(1) and would violate it should the measure be found to impair judicial independence. Article 19(1) TEU does not however "preclude general salary-reduction measures [...] linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme, from being applied to the members of the Tribunal de Contas".⁸⁷

The practical, if not far-reaching, consequence of the Court's interpretation in this case is that **private parties have since been able to directly rely upon the second subparagraph of Article 19(1) TEU to directly challenge, in the context of domestic proceedings, national measures or practices on account of their (alleged) violation of the EU requirements of effective judicial protection.** Indeed, while the Court only initially implicitly recognised that the second subparagraph of Article 19(1) TEU has **direct effect**, the Court has since explicitly confirmed that this provision "imposes on the Member States a clear and precise obligation as to the result to be achieved that is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law".⁸⁸ Another crucial consequence of the *ASJP* judgment is that it also finally **convinced the Commission to launch infringement actions directly on the basis of Article 19(1) TEU**, which the Commission did soon afterwards.

In order to further clarify the scope of application of the second subparagraph of Article 19(1) TEU and concomitant jurisdiction of the Court of Justice, this study will first outline several examples of such actions post *ASJP* judgment, starting with the Court's judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, to show the type of national measures or practices relating to a national judiciary as a whole, specific courts or judges themselves, may be reviewed by the Court under Article 258 TFEU.⁸⁹ Several examples of national requests for a preliminary

⁸⁵ 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, p. 631.

⁸⁶ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para. 40.

⁸⁷ *Ibid.*, para. 52.

⁸⁸ Judgment of 2 March 2021 in Case C-824/18, *A.B. et al. (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, para. 146.

⁸⁹ Article 259 TFEU is not discussed as notwithstanding the repeated calls for EU Member States to launch their own infringement actions to palliate the Commission's parsimonious use of the infringement procedure to address rule of law backsliding, no Member State has done so in a rule of law context. See D. Kochenov, "Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool" (2016) 15 *Hague Journal on*

ruling asking the Court questions to clarify the extent to which, if any, the second subparagraph of Article 19(1) TEU may be interpreted as precluding national measures or practices relating to the same issues will then be offered, starting with another Poland related judgment, this time, the Court's judgment of 19 November 2019 in Joined Cases C-585/18, C-624/18 et C-625/18, *A. K. e.a. (Independence of the disciplinary chamber of the Supreme Court)*.⁹⁰

the Rule of Law 153 and G. Íñiguez, "The Enemy Within? Article 259 TFEU and the EU's Rule of Law Crisis" (2022) 23 *German Law Journal* 1104. And for a rare example of a national parliament instructing its national government to launch an Article 259 TFEU action in light of persistent Commission's inaction regarding Polish authorities' flouting of EU rule of law requirements and the Court of Justice's case law, see "Dutch government urged to sue Poland in top EU court over rule of law debacle", *Euractiv*, 2 December 2020: https://www.euractiv.com/section/politics/short_news/dutch-government-urged-to-sue-poland-in-top-eu-court-over-rule-of-law-debacle/.

⁹⁰ EU:C:2019:982.

3. RELIANCE ON ARTICLE 19(1) TEU IN INFRINGEMENT CASES

To date, the Commission has directly relied on the second subparagraph of Article 19(1) TEU to lodge infringement actions with the Court of Justice only in relation to Poland's "rule of law crisis",⁹¹ notwithstanding manifest and systemic violations of Court of Justice's case-law in countries such as Hungary and Romania.⁹² Be that as it may, this Section will provide an overview of the following judgments:

- Judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*;
- Judgment of 5 November 2019 in Case C-192/18, *Commission v Poland (Independence of ordinary courts)*;
- Judgment of 15 July 2021 in Case C-791/19, *Commission v Poland (Disciplinary Regime of Judges)*.

In addition, issues relating to the Court's jurisdiction will also be outlined in relation to the Court of Justice's forthcoming judgement in Case C-204/21, *Commission v Poland (Independence and private life of judges)* which one may expect to be delivered this year. This Section will conclude with the most recent infringement *Commission v Poland* case due to be lodged with the Court of Justice and which, for the first time, does not concern a law adopted by current Polish authorities but concerns the (irregular) composition and (unlawful) actions of Poland's (captured⁹³) constitutional court.

The Court of Justice's multiple orders in Case C-619/18 and Case C-791/19 will not be examined as they are of limited added value when it comes to the material content and scope of application of the second subparagraph of Article 19(1) TEU.⁹⁴ Indeed, the Court's orders merely reiterated the guiding principles of the Court's case law since *ASJP* when faced with the same inadmissibility arguments raised by the Polish government to challenge the Court's jurisdiction on the merits.⁹⁵ The Polish government's claim that the Court's order of 14 July 2021 within the framework of Case C-791/19 would be allegedly

⁹¹ For a detailed factual and legal chronology of Poland's rule of law crisis, see the judgment of the European Court of Human Rights of 15 March 2022 in *Grzęda* (application no. 43572/18) which, for the first time, makes use of this description, at para. 15: "The election of three judges [...] in December 2015 to seats that had been already filled in October sparked an intense legal controversy and marked the beginning of what is widely referred to by analysts as the rule of law crisis in the country." For a critical assessment of the Commission's enforcement record for the 2015-2020 period, 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 and for a detailed assessment of the situation as of 1 January 2023, L. Pech and J. Jaraczewski, "Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations", *CEU DI Working Paper* 2023/02.

⁹² For further details, see L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022.

⁹³ See W. Sadurski, "Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler" (2019) 11 *Hague Journal on the Rule of Law* 63.

⁹⁴ This is not to say that these orders do not represent a crucial component of the EU's rule of law toolbox. For a transversal assessment of the CJEU and ECtHR rule of law related orders, in particular in respect of the situation in Poland, see G. Gentile and D. Sartori, "Interim measures as "weapons of democracy" in the European legal space" (2023) 1 *European Human Rights Law Review* 18.

⁹⁵ See e.g. Order of the Vice-President of the Court of 14 July 2021, *Commission v Poland* (C-204/21 R, EU:C:2021:593), para. 53: "Consequently, [the provisions of Poland's law of 20 December 2019] may be subject to review in the light of the second subparagraph of Article 19(1) TEU in the context of an action for failure to fulfil obligations, and, consequently, to interim measures aimed, in particular, at their suspension that are ordered by the Court, under Article 279 TFEU, in the same context."

contrary to the Polish constitutional order will however be briefly discussed when the Commission's latest infringement action regarding Poland's (captured) Constitutional Tribunal is addressed.⁹⁶

3.1. Judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*⁹⁷

On 2 July 2018, the Commission launched an infringement procedure in relation to a Polish law which lowered the retirement age of sitting Supreme Court judges from 70 to 65. According to the Commission, the different measures provided for in this law are not compatible with Article 19(1) TEU as they undermine the principle of judicial independence, including the irremovability of judges.⁹⁸ On 24 September 2018, the Commission decided to refer the case to the Court of Justice, which delivered its judgement on 24 June 2019.

While this was not the first⁹⁹ but the second infringement action where the Commission raised a violation of the EU legal requirements relating to judicial independence under the second subparagraph of Article 19(1) TEU, the Court decided this action first most likely because "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".¹⁰⁰

As regards the applicability and the scope of Article 19(1) TEU, the Commission, relying in particular on the *ASJP* judgment, submitted that the Polish Supreme Court may rule on issues in relation to the application or interpretation of EU law. As such, the Polish Supreme Court must meet all EU requirement relating to judicial independence insofar as its composition, organisational structure and working methods are concerned.

By contrast, the Polish government, supported by the Hungarian government – then also subject to Article 7(1) TEU proceedings – claimed that national rules relating to a supreme court such as those challenged by the Commission in this case "cannot be the object of a review in the light of the second subparagraph of Article 19(1) TEU and Article 47 of EUCFR" (para. 37). Two main arguments were submitted in support of this view: (i) The organisation of national justice systems is an exclusive competence of the Member States; (ii) the second subparagraph of Article 19(1) TEU, similarly to Article 47 CFR but also general principles of EU law (Article 6(3) TEU), can only be relied upon in situations falling within the scope of EU law, which would not be the case in this case.

In response, the Court reiterated what it previously held in its *ASJP* judgment of 27 February 2018, in particular as regards the wider scope of application of the second subparagraph of Article 19(1) TEU

⁹⁶ One may just note at this stage that a judgment of a constitutional court – let alone an irregularly composed one which has ceased to be a court established by law – does not constitute a "change of circumstances" capable of calling into question the assessments set out in a Court's order. See Order of the Vice-President of the Court of 6 October 2021 in Case C-204/21 R-RAP, EU:C:2021:834, para. 25 (unsurprisingly, therefore, the Polish government's application seeking that the setting aside of the Vice-President's order of 14 July 2021, *Commission v Poland* (C-204/21 R, EU:C:2021:593) was dismissed.

⁹⁷ EU:C:2019:531.

⁹⁸ 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.

⁹⁹ See Case C-192/18 examined below in Section 3.2.

¹⁰⁰ Order of the Court of 17 December 2018 in Case C-619/18 R, EU:C:2018:1021, para 69.

compared to Article 47 CFR, **before rejecting the Polish government's exclusive competence claim** as follows (references omitted):

52 Furthermore, **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 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.

It follows that Poland, like any other EU Member State, must comply with the second subparagraph of Article 19(1) TEU. This means, inter alia, complying with the EU legal obligation to ensure that the national bodies, which constitute court or tribunal within the meaning of EU law and come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection. In the present instance, it was uncontested that the Polish Supreme Court is such a body and that it must continue to meet the EU requirements of effective judicial protection, including the requirement that courts be independent.

Accordingly, **the Court of Justice held that it has the jurisdiction to review the Polish Law on the Supreme Court of 8 December 2017 in the light of the second subparagraph of Article 19(1) TEU.** Following this review, the Court held for the first time that Poland violated the second subparagraph of Article 19(1) TEU by lowering the retirement age of the sitting judges of the Polish Supreme Court and 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.

3.2. Judgment of 5 November 2019 in Case C-192/18, *Commission v Poland (Independence of ordinary courts)*¹⁰¹

On 28 July 2017, the Commission launched its first rule of law backsliding infringement procedure to address Poland's rule of law crisis by challenging the compatibility with EU law of a Polish law on the organisation of ordinary courts. As outlined above, the Court of Justice decided the Commission's second infringement action relating to Poland's Supreme Court ahead of this one to address as rapidly as possible the capture of a key national judicial body to prevent serious damage to the EU legal order.

Considering this study's focus, it is worth stressing the legal bases relied upon by the Commission as regards the Polish law on the organisation of ordinary courts: (i) Article 157 TFEU and Directive 2006/54 on gender equality in employment as regards the introduction of a different retirement age for female judges (60 years) and male judges (65 years) and (ii) Article 19(1) TEU in combination with Article 47 CFR as regards the new rules giving the Minister of Justice the discretionary power to prolong the mandate of judges who have reached retirement age as well as the power to dismiss and appoint Court Presidents.¹⁰² This means that the Commission relied on Article 19(1) TEU to challenge national measures undermining judicial independence a few months before the Court of Justice made it plain clear in *ASJP* that this Treaty provision imposes a *justiciable* obligation on Member States to guarantee and maintain judicial independence of all national courts which may interpret and apply EU law beyond the normal scope of application of Article 47 CFR. One may note in this respect that in May

¹⁰¹ EU:C:2019:924.

¹⁰² European Commission, "European Commission launches infringement against Poland over measures affecting the judiciary", Press release IP/17/2205, 29 July 2017.

2017, Advocate General Saugmandsgaard Øe had already expressed the opinion that Article 19(1) TEU is not subject to Article 51(1) CFR and in particular the requirement that the provisions of the Charter only bind the Member States “when they are implementing EU law”.¹⁰³

On 20 December 2017, the Commission decided to refer the Polish Law on the Ordinary Courts to the Court of Justice minus – for reasons not made public – the previously mentioned discretionary power to dismiss and appoint ordinary Court Presidents, the same discretionary power which the European Court of Human Rights has since found to be incompatible with the ECHR.¹⁰⁴

In response to the Polish government's claim that the Polish law on the organisation of ordinary courts cannot “be reviewed in the light of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter without extending excessively the scope of those provisions of EU law, which are intended to apply only in situations governed by EU law” (para. 93), **the Court responded by reiterating what it previously held in its judgments of 27 February 2018 in Case C-64/16 and of 4 June 2019 in Case C-619/18.** It then concluded as follows in respect of the applicability and scope of the second subparagraph of Article 19(1) TEU:

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. [...]

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.

In the present case, the Court concluded that Polish authorities had indeed violated the second subparagraph of Article 19(1) TEU by granting the Minister for Justice the right to decide whether or not to authorise judges of the ordinary Polish courts to continue to carry out their duties beyond the new retirement age of those judges.

3.3. Judgment of 15 July 2021 in Case C-791/19, *Commission v Poland* (Disciplinary Regime of Judges)¹⁰⁵

On 3 April 2019, the Commission launched its **third infringement procedure in respect of Poland's rule of law crisis based on Article 19(1) TEU**.¹⁰⁶ In this instance, the Commission considered the new disciplinary regime for Polish judges not to be compatible inter alia with Article 19(1) TEU read in connection with Article 47 CFR (comparably to what it argued in its first two infringement actions outlined above) as Poland's new disciplinary regime (i) allows for disciplinary investigations,

¹⁰³ Opinion of Advocate General Saugmandsgaard Øe delivered on 18 May 2017 in Case C-64/16, EU:C:2017:395, para. 37.

¹⁰⁴ Judgment of 29 June 2021 in the cases of *Broda and Bojara v Poland*, applications no. 26691/18 and 27367/18, CE:ECHR:2021:0629JUD002669118.

¹⁰⁵ EU:C:2021:596.

¹⁰⁶ 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.

proceedings and sanctions against Polish judges on account of the content of their judicial decisions; (ii) provides for the involvement of a last instance body known as the Disciplinary Chamber which is not independent; (iii) does not ensure that a proper court (i.e., a court established by law) will decide in first instance on disciplinary proceedings against ordinary court judges; (iv) and restricts judges' procedural rights as well as undermines their right of the defence in disciplinary proceedings.

On 10 October 2019, the Commission decided to refer Poland to the Court of Justice, which issued its judgment on 15 July 2021.

As regards the Court's jurisdiction, the Polish government continued to deny that national rules relating to the judiciary can be reviewed in the light of EU law and in particular, the second subparagraph of Article 19(1) TEU. In the present case, the Polish government claimed that the disciplinary cases against Polish judges conducted on the basis of the procedural provisions challenged by the Commission would be "of a purely internal nature" (para. 49). More originally, the Polish government submitted "that the second subparagraph of Article 19(1) TEU does not constitute the source of fundamental rights of the defence or the right to be heard within a reasonable time" and since disciplinary cases concerning Polish judges do not amount to situations where EU law is being implemented, Articles 47 and 48 CFR would also be inapplicable (para. 49).

In response, the Court reiterated once again what it previously held, in particular in its first (infringement) judgment of 24 June 2019, and unsurprisingly confirmed that both the Polish Supreme Court and Polish ordinary courts may be called upon to rule on questions relating to the application or interpretation of EU law and 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. As regards specifically national rules governing the disciplinary regime applicable to judges, the Court also reiterated that the requirement of independence derived from EU law, and, in particular, from the second subparagraph of Article 19(1) TEU, means that national authorities must ensure that a disciplinary regime is not used or could be used as a system of political control of the content of judicial decisions. It follows that **the new Polish rules regarding disciplinary proceedings challenged by the Commission "are amenable to review in the light of the second subparagraph of Article 19(1) TEU"** (para. 62).

Following this review, the Court held that Poland had violated Article 19(1) TEU on multiple grounds as the new disciplinary regime for judges (i) fails to guarantee the independence and impartiality of the Disciplinary Chamber; (ii) allows the content of judicial decisions to be classified as a disciplinary offence; (iii) confers on the President of the Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning ordinary court judges; (iv) fails to guarantee that disciplinary cases are examined within a reasonable time in addition to providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect despite the justified absence of the notified accused judge or his/her defence counsel.

3.4. Forthcoming judgement in Case C-204/21, *Commission v Poland* (Independence and private life of judges)

On 29 April 2020, the Commission launched **its fourth infringement procedure** since the start of Poland's rule of law crisis at the end of 2015. The Commission did so by relying again *inter alia* on Article 19(1) TEU, read in conjunction with Article 47 CFR, following the adoption of yet another law allegedly "reforming" the Polish judiciary on 20 December 2019. This new law, formally known as the Law

amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, is more widely known under the informal name of Poland's "muzzle law".¹⁰⁷

For the Commission, this latest "reform" is yet again incompatible with EU law as (i) it prevents Polish courts from assessing, in the context of cases pending before them, the requirements of judicial independence and from requesting a preliminary ruling; (ii) it grants the new Chamber of Extraordinary Control and Public Affairs the sole competence to rule on issues regarding judicial independence; (iii) it broadens the notion of disciplinary offence by allowing the assessment by Polish courts of the requirements of judicial independence, and thus the content of judicial decisions, to be qualified as a disciplinary offence; and (iv) it imposes a disproportionate obligation on judges to provide information for the purposes of publication about specific non-professional activities.

On 3 December 2020, the Commission added a new grievance to this infringement procedure relating to the Disciplinary Chamber.¹⁰⁸ For the Commission, by allowing the Disciplinary Chamber to decide matters which directly affect the status of judges and the exercise of their judicial activities, Poland is undermining the ability of Polish courts to provide an effective remedy as required by the second subparagraph of Article 19(1) TEU.

On 1 April 2021, the Commission lodged its infringement action with the Court of Justice, which is yet to deliver its judgment in this case at the time of finalising this study. One may however expect the Court of Justice to do so in 2023 as the Advocate General – in this case, AG Collins – delivered his Opinion on 15 December 2022.¹⁰⁹ For the time being, Polish authorities continue to violate the Court of Justice's order of 14 July 2021, which ordered the immediate suspension of key provisions of Poland's muzzle law, at a cost of €1m per day in daily penalty payment.¹¹⁰

As regards the applicability and the scope of the second subparagraph of Article 19(1) TEU, an adjustment of the Polish government's previous stance may be noted in this case as the Polish government did not dispute that Polish "ordinary courts, the Supreme Court and the administrative courts must comply with the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, in the light of the case-law of the ECtHR concerning Article 6(1) ECHR and the principle of primacy of EU law" (para. 133). However, the Polish government has since shifted back to a more confrontational and unprecedented position following a set of decisions issued by Poland's (unlawfully composed and presided) "Constitutional Tribunal". According to this body, the second subparagraph of Article 19(1) TEU, as interpreted by the Court of Justice, and Article 6(1) ECHR, as interpreted by the European Court of Human Rights, allegedly violate Poland's Constitution.¹¹¹ These unprecedented developments finally led the Commission in February 2023 to announce the lodging with the Court of

¹⁰⁷ 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.

¹⁰⁸ European Commission, "Rule of Law: Commission follows up on infringement procedure to protect judicial independence of Polish judges", Press release, INF/20/2142, 3 December 2020.

¹⁰⁹ Opinion of AG Collins delivered on 15 December 2022 in Case C-204/21, *Commission v Poland*, EU:C:2022:991.

¹¹⁰ See order of 27 October 2021 in Case C-204/21 R, EU:C:2021:878. As of 1 January 2023, Polish authorities have accumulated more than €420m in unpaid daily penalty payments which the Commission has begun deducting in 2022 from EU funding allocated to Poland in light of the Polish authorities' continuing and unprecedented refusal to pay the daily penalty payment ordered by the Court of Justice.

¹¹¹ For further analysis, see European Commission, 2022 Rule of Law Report - Country Chapter on the rule of law situation in Poland, SWD(2022) 521 final, 13 July 2022 and Council of Europe, Report by the Secretary General under Article 52 of the ECHR on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, SG/Inf(2022)39, 9 November 2022.

Justice of its fifth Poland's rule of law crisis related infringement action, this time in relation to the body presenting itself as Poland's Constitutional Tribunal (see *infra* Section 3.5).

Within the framework of Case C-204/21, the **Polish government did continue to object to the Court of Justice's jurisdiction** as regards the transfer of jurisdiction to the Disciplinary Chamber, which the Polish government presented as linked to the organisation of the judiciary and therefore allegedly not amenable to review under EU law as this would fall within the exclusive competence of the Member States. In response to this recurrent but erroneous claim, **AG Collins reiterated that the second subparagraph of Article 19(1) TEU obliges Member States to ensure that courts or tribunals liable to rule on the application or interpretation of EU law meet the requirements of effective judicial protection.**¹¹² In the present instance, given the serious impact disciplinary and lifting of judicial immunity measures have on the lives and careers of judges liable to rule on the application or interpretation of EU law, it is imperative according to AG Collins that these measures are reviewed by a national "body that itself meets the requirements inherent in effective judicial protection in accordance with the second subparagraph of Article 19(1) TEU" (para. 206). This interpretation is as unsurprising as it is unwarranted considering the well-established case of law of the Court.

One may finally note that the **Polish government used another exclusive national competence-based argument in relation to the data-related provisions of Poland's muzzle law.** For AG Collins, however, contrary to the Polish government's claims, the EU General Data Protection Regulation (GDPR) "does not exclude the organisation and/or the administration of justice in the Member States from the material scope of that regulation" (para. 233), with **the GDPR not excluding "the organisation of justice or judicial activity from its scope per se"** but rather limiting "the application of certain of its provisions in a number of specific instances" (para. 234). The Court's judgement on the merits is expected this year.

3.5. Forthcoming judgment in respect of Poland's (captured) Constitutional Tribunal

On 22 December 2021, the Commission launched a **fifth infringement procedure in relation to Poland's rule of law crisis** then in its sixth year. For the Commission, two decisions issued in July and October 2021 by Poland's (captured) Constitutional Tribunal violate *inter alia* Article 19(1) TEU by giving this Treaty provision "an unduly restrictive interpretation."¹¹³ In addition, the Commission considers that the **Constitutional Tribunal itself violates Article 19(1) TEU as "it no longer meets the requirements of a tribunal previously established by law"**, as required by this Treaty provision, due *inter alia* to the gross irregularities and deficiencies which marred the appointment procedures of three judges in December 2015 and the selection of the President and Vice-President in December 2016. It follows that the current Constitutional Tribunal can no longer ensure effective judicial protection by an independent and impartial tribunal established by law, as required by Article 19(1) TEU, in respect of individual cases which concern the interpretation and application of EU law.

This is the first time the Commission has launched an infringement action on account of a national court of law resort having stopped being a court due to its irregular composition and the irregular appointment of its president and vice-president. It is however an action which

¹¹² Opinion of AG Collins delivered on 15 December 2022 in Case C-204/21, *Commission v Poland (Independence and private life of judges)*, EU:C:2022:991.

¹¹³ European Commission, "Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal", Press release, IP/21/7070, 22 December 2021.

responds to an unprecedented situation. Indeed, no court of last resort had ever denied the legal effects of the Court of Justice's rulings interpreting a Treaty provision which guarantees the right to effective judicial protection on account of the alleged unconstitutionality of the Court's interpretation. In doing so, Poland's (irregularly composed and presided) Constitutional Tribunal deprived all "individuals before Polish courts from the full guarantees set out in the provision"¹¹⁴ before doing the same in relation to the full guarantees set out in Article 6(1) ECHR.¹¹⁵

The infringement action in the present instance is the first time the Commission has acted in respect of a national body masquerading as a constitutional court. Prior to this, the Commission did also act in respect of a properly composed and independent national constitutional court.¹¹⁶ One may refer in this respect to the launch of an infringement action on 9 June 2021 against Germany following a judgment of 5 May 2020 of the German Federal Constitutional Court which, in manifest violation of the EU Treaties, declared a judgment of the Court of Justice *ultra vires*, thereby depriving it of its legal effect in Germany.¹¹⁷ This action was however closed on 2 December 2021 following a formal declaration by the German government recognising the values laid down in Article 2 TEU, including in particular the rule of law; the authority of the Court of Justice; and that the legality of acts of EU institutions cannot be made subject to the examination of constitutional complaints before German courts.¹¹⁸

On 15 February 2023, the Commission finally referred Poland to the Court of Justice considering the continuing instrumentalisation of the captured Constitutional Tribunal to give a veneer of legality to the systemic violation of the right to effective judicial protection under Article 19(1) TEU, in addition to violating "the general principles of autonomy, primacy, effectiveness, uniform application of Union law and the binding effect of rulings of the Court of Justice of the European Union".¹¹⁹ Last but not least, the Commission has also asked the Court to find Poland in violation of Article 19(1) due to their actions which have resulted in the Constitutional Tribunal no longer meeting the requirements of an independent and impartial tribunal previously established by law. This amounts, according to the Commission, to an **additional breach of Article 19(1) TEU as the Constitutional Tribunal is no longer able to provide effective judicial protection in the fields covered by EU law.**

¹¹⁴ Ibid.

¹¹⁵ On 9 November 2022, the Secretary General of the Council of Europe, in her report issued on the basis of Article 52 ECHR, acknowledged that the "ensuing obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction *is not, at this stage, fulfilled*" (emphasis added), and noted with concern the rising number of applications pending before the European Court in relation to Poland's rule of law crisis due to deficient judicial appointments. See Council of Europe, Report by the Secretary General under Article 52 of the ECHR on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, SG/Inf(2022)39, 9 November 2022, para. 29 and para 31.

¹¹⁶ Looking beyond national constitutional courts, there is well-established case law of the ECJ making clear that an infringement action may be contemplated against a Member State whose action or inaction leads to a violation of EU law, even in a situation where the violation of EU law is due to a constitutionally independent institution such as a national supreme court: See Judgment of 9 December 2003 in Case C-129/00, *Commission v Italy*, EU:C:2003:656; Judgment of 12 November 2009 in Case C-154/08, *Commission v Spain*, EU:C:2009:695. Indeed, "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", Judgment of 4 October 2018 in Case C-416/17, *Commission v France* (Advance payment), EU:C:2018:811, para. 107.

¹¹⁷ European Commission, "Primacy of EU law: Commission sends letter of formal notice to GERMANY for breach of fundamental principles of EU law", INF/21/6201, 9 June 2021.

¹¹⁸ European Commission, Primacy of EU law: Commission closes infringement procedure based on formal commitments of GERMANY clearly recognising the primacy of EU law and the authority of the Court of Justice of the European Union, INF/21/6201, 2 December 2021.

¹¹⁹ European Commission, "The European Commission decides to refer POLAND to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal", Press release, IP/23/842, 15 February 2023.

One may finally add this is also true of the fields covered by Polish law according to a panel of three regularly appointed judges of Poland's Supreme Administrative Court. Indeed, in a ruling of 16 November 2022,¹²⁰ they held that Poland's current Constitutional Tribunal can no longer be considered a court as it is "infected" with unlawfulness and has lost therefore "its ability to adjudicate in accordance with the law" as "there is a high degree of probability that at least one of the so-called 'doubblers' will be included in the adjudicating panel ... In such a situation, suspending proceedings and relying on 'blind chance' that perhaps one of the 'doubblers' will not be in the panel is burdened with too much risk".¹²¹

¹²⁰ Case III OSK 2528/21.

¹²¹ Ł. Woźnicki, "Supreme Administrative Court: The Constitutional Tribunal has been infected with illegality", Rule of Law in Poland, 7 December 2022: <https://ruleoflaw.pl/supreme-administrative-court-the-constitutional-tribunal-has-been-infected-with-illegality/>.

4. RELIANCE ON ARTICLE 19(1) TEU IN PRELIMINARY RULING CASES

According to Article 267 TFEU, the Court of Justice of the EU has jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties and (b) the validity and interpretation of EU acts. As this study is primarily concerned with the interpretation of EU requirements relating to effective judicial protection in relation to national measures, this Section will **focus on preliminary ruling cases where national courts asked the Court of Justice to interpret these EU requirements with the view of enabling them to subsequently decide whether relevant national rules are compatible with EU law** as it is up to the national referring courts to disapply, if necessary, the national rules they held to be incompatible with EU law.

As regards the scope of any request for a preliminary ruling, it is well established the Court of Justice can give a preliminary ruling providing the referring national court with an interpretation of EU law “only if EU law applies to the case in the main proceedings”.¹²² In this respect, it is important to stress that while the Court of Justice “is in principle bound” to give a preliminary ruling where the questions submitted by a national court concern the interpretation of EU law, **the Court must** also “examine the circumstances in which cases are referred to it by the national court in order to **assess whether it has jurisdiction or whether the request submitted to it is admissible**”.¹²³

Unsurprisingly, as will be outlined below in respect of the requests asking the Court to interpret the second subparagraph of Article 19(1) TEU, **national governments, in particular the Polish government, have challenged both the jurisdiction of the Court and the admissibility of the requests, including the admissibility of specific questions.** At this stage, however, many more examples of successful reliance on the second subparagraph of Article 19(1) TEU can be outlined than the number of cases where the Court held a national request for a preliminary ruling inadmissible for lack of jurisdiction. More examples can however be found where the Court found specific questions inadmissible on different grounds such as the hypothetical nature of the question submitted to it but this is in no way specific to the rule of law preliminary ruling requests this study focuses on.

4.1. Successful reliance

The first significant preliminary ruling delivered by the Court of Justice post its landmark preliminary ruling in *ASJP* concerns one of the most emblematic, not to forget in manifest breach of Poland's Constitution, EU and ECHR law, new body set up by Poland's current ruling coalition and known as the Disciplinary Chamber.¹²⁴ This section will end by highlighting four pending requests for a preliminary ruling also originating from Polish courts and primarily relating to Article 19(1) TEU (Joined Cases C-615/20 and C-671/20, *YP and Others* and Joined C-181/21 and C-269/21, *G. and Others*). These cases are worth noting inter alia because the Polish government did not seek to challenge the jurisdiction of the Court to challenge instead the admissibility of the requests. In two opinions delivered on 15 December

¹²² CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2019] OJEU C 380/1, para. 10.

¹²³ See, to that effect, the Grand Chamber judgment of 24 April 2012 in Case C-571/10, *Kamberaj*, EU:C:2012:233, para 41.

¹²⁴ For further analysis and references, see L. Pech and J. Jaraczewski, “Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations”, CEU DI Working Paper 2023/02: <https://democracyinstitute.ceu.edu/articles/laurent-pech-jakub-jaraczewski-systemic-threat-rule-law-poland-updated-and-new-article-71>.

2022, Advocate General Collins advised the Court to dismiss all of the objections as to the admissibility of the questions asked by the referring courts.

4.1.1. Judgment of 19 November 2019 (Grand Chamber) in Joined Cases C-585/18, C-624/18 et C-625/18, *A. K. e.a. (Independence of the disciplinary chamber of the Supreme Court)*¹²⁵

This judgment is the first most significant preliminary ruling delivered by the Court of Justice post its seminal *ASJP* preliminary ruling. It is also the **first national request for a preliminary ruling which provided the Court with an opportunity to address some key aspects of Poland's rule of law crisis**. Indeed, in this set of national requests for a preliminary ruling, the referring courts asked inter alia whether Article 2 and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 CFR must be interpreted as meaning that a chamber of a national supreme court such as Poland's Disciplinary Chamber satisfies the EU requirements of independence and impartiality and what the referring courts may do if they hold this not to be the case.

As regards the applicability of these provisions of EU law and the concomitant jurisdiction of the Court of Justice to interpret them, in line with the position adopted by the Polish government in the first three infringement actions outlined *supra* in Section 3 of this study, Poland's Public Prosecutor submitted that the Court had no jurisdiction to answer the referred questions since they would allegedly concern issues which fall within the exclusive competences of the Member States. In response, the Court reiterated that when it previously held: "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. 75).

As regards the more case-specific claim made by the Public Prosecutor that the Court lacks the jurisdiction to answer the questions concerning the second subparagraph of Article 19(1) TEU and Article 47 CFR because the provisions of Polish law at issues would allegedly not implement EU law or fall within the scope thereof, the **Court first confirmed that Article 47 CFR is applicable as the present cases concern situations governed by EU Law**, i.e., Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. **As regards the second subparagraph of Article 19(1) TEU, the Court also found it applicable** since the national court "called on to dispose of the cases will be required to rule on questions concerning the application or interpretation of EU law and thus falling within the fields covered by EU law within the meaning of the second subparagraph of Article 19(1) TEU" (para. 84).

Lastly, the Court quickly disposed of the claim relating to the Protocol No 30 on the application of the EU Charter of Fundamental Rights to Poland and to the UK first raised in infringement Case C-619/18 by restating the obvious: **"that protocol does not concern the second subparagraph of Article 19(1) TEU** and it should be recalled that it does not call into question the applicability of the Charter in Poland, nor is it intended to exempt the Republic of Poland from the obligation to comply with the provisions of the Charter" (para. 85).

To answer the substance of the relevant questions asked by the referring courts, the Court did not however deem it necessary to conduct an analysis of both Article 47 CFR and Article 19(1) TEU as any analysis based on the later provision could "only reinforce" (para. 169) the Court's conclusion set out in

¹²⁵ EU:C:2019:982.

the judgment on the basis of Article 47 CFR: Disputes concerning the application of EU law must not fall within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. If they do, the principle of primacy of EU law requires national courts to disapply the relevant provision of national law so that these cases may be examined by a proper court which, were it not for that provision, would have jurisdiction in the relevant field.

4.1.2. Judgment of 2 March 2021 (Grand Chamber) in Case C-824/18, *A.B. et al (Appointment of judges to the Supreme Court – Actions)*¹²⁶

In this preliminary ruling case originating again from Poland, one of the questions submitted by the referring court concerned the interpretation of Article 2 TEU, the second subparagraph of Article 19(1) TEU and Article 47 CFR in relation to successive amendments to the Polish law on the National Council of the Judiciary (NCJ in English, KRS in Polish). These amendments had the effect of preventing any effective judicial review of the decisions adopted by the (unconstitutionally re-established and captured¹²⁷) NCJ proposing (or not proposing) candidates for the office of judge at the Supreme Court to the Polish President.

As regards the Court of Justice's jurisdiction, Poland's Public Prosecutor raised yet again an argument based on the exclusive competence of the EU Member State as regards the organisation of national judiciaries which would allegedly make the issue of judicial remedies concerning procedures for the appointment of judges an area not amenable to review by the Court. In response, the Court reiterated what it held in its previous judgments. In short: EU Member States must always comply with their EU law obligations even when exercising their exclusive competences, including when they adopt "national rules relating to the substantive conditions and procedural rules governing the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures" (para. 68). The Court had therefore jurisdiction to rule on the request for a preliminary ruling submitted by the Polish referring court, in this instance, Poland's Supreme Administrative Court.

As regards the admissibility of the question relating to the judicial review of the neo-NCJ's decisions in light of EU law and in particular Article 19(1) TEU and Article 47 CFR, the Court of Justice also rejected the claim based on the EU's lack of competence concerning procedures for the appointment of judges in the Member States. The Court did so by reiterating what it held in relation to its alleged lack of jurisdiction and observing that the arguments put forward by the Polish government relate to the substance of the question referred and cannot therefore lead to the inadmissibility of the question.

As regards the applicability of Article 19(1) TEU and Article 47 CFR, the Court held that Article 47 CFR was not applicable as it was not apparent that "the disputes in the main proceedings concern the recognition of a right conferred on the appellants in the main proceedings under a provision of EU law" (para. 89). By contrast, **the second subparagraph of Article 19(1) TEU was applicable as Poland's Supreme Court, and in particular its Civil and Criminal Chambers, may be called upon to rule on questions concerning the application or interpretation of EU law and are courts, within the meaning of EU law, which come within the Polish judicial system in the fields covered by Union law**. As such, the Supreme Court's Civil and Criminal Chambers must meet the EU requirements of

¹²⁶ EU:C:2021:153.

¹²⁷ On 2 June 2022, in Case I KZP 2/22, seven (lawfully appointed) judges of the Criminal Chamber of the Supreme Court held that the neo-NCJ is a new body "not identical" to the one laid down in the Polish Constitution. Any judicial appointment involving this unconstitutional body is therefore irregular according to the Criminal Chamber.

effective judicial protection. It follows that the referring court could submit questions concerning the interpretation of the second subparagraph of Article 19(1) TEU and in particular ask the Court of Justice “whether that provision may make it necessary, in the particular context of the process of appointing judges to the Sąd Najwyższy (Supreme Court), to maintain judicial review with regard to resolutions of the KRS such as those at issue in the main proceedings, and to the conditions under which such review should, in that case, be carried out” (para. 120).

In this case, the Court concluded that the second subparagraph of Article 19(1) TEU precludes amendments made to the national legal system such as the 2018 and 2019 amendments made to the Polish law on the NCJ where it is apparent that these amendments are capable of giving 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. The European Court of Human Rights has since established in several rulings in 2021 and 2022¹²⁸ – all of which remain violated by Polish authorities to this day¹²⁹ – that all of the individuals appointed to the Supreme Court since 2018 in a procedure involving the neo-NCJ cannot lawfully adjudicate due inter alia to the grave irregularities which marred their appointments.

4.1.3. Judgment of 20 April 2021 (Grand Chamber) in Case C-896/19, *Repubblika v Il-Prim Ministru*¹³⁰

While the rule of law situation in Malta has attracted the attention of EU and Council of Europe bodies for some time,¹³¹ the **Commission has never launched a rule of law related infringement action to date** and it was not until this request for a preliminary ruling originating from the Constitutional Court of Malta, lodged in December 2019, that the Court of Justice had the opportunity to answer rule of law related questions in respect of Malta.

In this specific instance, the referring court asked the Court whether Article 19(1) TEU and Article 47 CFR may be interpreted as precluding Maltese judicial appointment rules in the context of legal proceedings between Repubblika, an association whose purpose is to promote the protection of justice and the rule of law in Malta, and the Prime Minister of that Member State. For the association, and to put it briefly, the discretion which several provisions of the Maltese Constitution confer on the Prime Minister in the procedure for appointing members of the judiciary would not comply with the requirements of the second subparagraph of Article 19(1) TEU and of Article 47 CFR.

As regards the Court of Justice’s jurisdiction, unlike the Polish government in previous cases, the **Maltese government did not challenge the jurisdiction of the Court** to answer the request for a preliminary ruling submitted by the Maltese referring court. The Polish government did however deem it necessary to challenge the admissibility of these questions on two but specious grounds, one of which was nevertheless “original”. To begin with the recurrent one, the Polish government repeated the previously rejected claim that in the absence of EU competence in the field of organisation of

¹²⁸ Judgment of 22 July 2021 in *Reczkowicz v Poland*, application no. 43447/19, CE:ECHR:2021:0722JUD004344719; judgment of 8 November 2021 in *Dolińska-Ficek and Ozimek v Poland*, application nos. 49868/19 and 57511/19, CE:ECHR:2021:1108JUD004986819; judgment of 3 February 2022 in *Advance Pharma v Poland*, application no. 1469/20, CE:ECHR:2022:0203JUD000146920.

¹²⁹ L. Pech and J. Jaraczewski, “Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations”, *CEU DI Working Paper* 2023/02: <https://democracyinstitute.ceu.edu/articles/laurent-pech-jakub-jaraczewski-systemic-threat-rule-law-poland-updated-and-new-article-71>

¹³⁰ EU:C:2021:31.

¹³¹ See e.g. most recently, European Parliament resolution of 20 October 2022 on the rule of law in Malta, five years after the assassination of Daphne Caruana Galizia, PA_TA(2022)0371.

judicial systems, the Court lacked the jurisdiction to answer preliminary questions relating to national rule governing the appointment of members of the judiciary or the organisation of national courts and tribunals in the light of the second subparagraph of Article 19(1) TEU. As regards the applicability of Article 47 CFR, the Polish government argued that it was inapplicable as there would be no implementation of EU law in the present case. More originally, the Polish government alleged that the Maltese referring court was in effect asking the Court to decide whether the provisions of Maltese law at issue in the main proceedings are compliant with EU law which would amount, in essence, to a disguised infringement action.

In response to the alleged circumvention of the infringement procedure, the Court reiterated that while it is indeed “not the task of the Court, in preliminary-ruling proceedings, to rule upon the compatibility of provisions of national law with the legal rules of the European Union, the Court does, however, have jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it” (para. 30). In the present case, it is manifest that the referring court requested an interpretation of the second subparagraph of Article 19(1) TEU and of Article 47 CFR in order to enable it to resolve the specific dispute pending before that court, i.e., whether the national provisions relating to the process for appointing members of the judiciary are in conformity with those provisions of EU law. Accordingly, **the Court rejected the Polish government’s objection based on Articles 258-259 TFEU. It also rejected the objection relating to the applicability of Article 19 TEU and Article 47 CFR** as it is well-established that inadmissibility arguments which relate to the substance of the questions referred cannot, “by their very nature, lead to the inadmissibility of those questions” (para. 33). The Court had therefore jurisdiction to answer the request for a preliminary ruling and all of the questions referred were also found admissible.

As regards substance and in particular the scope of application of Article 19(1) TEU versus the scope of application of Article 47 CFR, the Court unsurprisingly held that “Maltese judges and magistrates may be called upon to rule on questions relating to the application or interpretation of EU law and that they form part, as ‘courts or tribunals’ as defined by that law, of the Maltese judicial system in the ‘fields covered by Union law’, within the meaning of the second subparagraph of Article 19(1) TEU” (para. 38). It follows, inter alia, that Maltese courts must meet the requirements of effective judicial protection.

As regards the association’s reliance on Article 19(1) TEU, the Court confirmed the broad scope of application of this provision which is intended to apply in the context of an action provided for by national law, the purpose of which is “to challenge the conformity with EU law of provisions of national law which it is alleged are liable to affect judicial independence” (para. 39). By contrast, Article 47 CFR cannot be relied upon as “the recognition of that right, in a given case, presupposes, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law” (para. 40).

In the present case, however, the association was not relying on a specific right conferred on it by a provision of EU law or claiming any infringement of a right conferred on it under a provision of EU law. Instead, the association challenged the conformity with EU law of Maltese constitutional provisions regarding judicial appointments. For the Court of Justice, it follows that **Article 47 CFR was not, as such, applicable to the dispute in the main proceedings although Article 47 CFR must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU**. In a subsequent paragraph, the Court further helpfully clarified the different yet complementary scope of application of both provisions as follows:

52 Thus, while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any *individual* relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the *system* of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law. (emphasis added)

This preliminary ruling's key added value is arguably to be found elsewhere as the Court also established **for the first time** that the second subparagraph of Article 19(1) TEU guarantees a **non-regression principle** and must be therefore interpreted as precluding a Member State from amending its legislation, particularly in regard to the organisation of justice, "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" (para. 63). In this context, it is also worth noting that the Court stressed that "the independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects" (para. 51), a phrasing first used (to the best of this author's knowledge) in a judgment of 9 July 2020¹³² where however the Court did not answer the question relating to judicial independence on account that it was not objectively required for the decision which must be made by the referring court.

As regards the situation existing in Malta, the Court did not identify any regression. Indeed, the involvement of a body such as the Judicial Appointments Committee established in 2016 "may, in principle, be such as to contribute to rendering" the process for appointing members of the judiciary "more objective, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard" as long as such a body is "itself sufficiently independent of the legislature, the executive and the authority to which it is required to submit an opinion on the assessment of candidates for a judicial post" (para. 66). As a matter of principle, the second subparagraph of Article 19(1) TEU does not, therefore, preclude "national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible for, inter alia, assessing candidates for judicial office and giving an opinion to that Prime Minister" (para. 73).

4.1.4. Judgment of 18 May 2021 (Grand Chamber) in 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*¹³³

This judgment, which may be informally referred to as *Romanian Judges I*, answered a grand total of six requests for a preliminary ruling from Romanian regional courts and courts of appeal. These multiple requests primarily concerned the Romanian Judicial Inspectorate, the Supreme Council of the Judiciary (SCJ) and the special section within the Public Prosecutor's Office (SIJ) following the entry into force of legislative amendments adopted between 2017 and 2019 whose primary aim was to undermine judicial independence in a context where the Romanian Constitutional Court, in a manner reminiscent of Poland's (irregularly composed and presided) Constitutional Tribunal, has been furthermore seeking to neutralise the legal effects of EU rule of law requirements.¹³⁴

In this lengthy judgment (+30,000 words), the Court addressed questions primarily concerned with the interpretation of "fundamental provisions of EU law" (para. 105) such as Article 2, Article 4(3), Article 9 and the second subparagraph of Article 19(1) TEU; Article 67(1) and Article 267 TFEU; and Article 47

¹³² Case C-272/19, *Land Hessen*, EU:C:2020:535, para. 45.

¹³³ EU:C:2021:393.

¹³⁴ See the Court of Justice's judgments outlined *infra* in Sections 4.1.7. and 4.1.8.

CFR. In addition, the Court answered multiple questions concerning the legal nature and effects of the Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.

To merely focus on the jurisdiction of the Court of Justice, one may first note that **the Polish government supported the Romanian government's position whereby the Court would lack jurisdiction to answer many of the referring courts' questions**. As usual, the Polish government claimed that national rules relating to the organisation of justice falls outside the scope of EU law. The Polish government made a similar claim in relation to the questions regarding Romanian rules on State liability for damage caused by judges to individuals as a result of an infringement of national law. The Romanian government adopted this approach and also claimed that many of the questions "relate to the organisation of justice, which is not an EU competence" (para. 109). The Romanian government however went further and also submitted that a number of questions were concerned with national provisions which are not implementing EU law and therefore completely outside the jurisdiction of the Court of Justice. At the same time, in a logic not easy to follow, the Romanian government did nevertheless concede that "the second subparagraph of Article 19(1) TEU could, in the light of the case-law derived from the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* [...] be of relevance to the issues raised by the referring courts in those questions" (para. 109).

In response, the Court of Justice unsurprisingly first observed that the requests for a preliminary ruling relate in fact the actual scope of EU primary and secondary law, and therefore their interpretation. It then reiterated that although the organisation of justice, "including the organisation of the Public Prosecutor's Office" (para. 210), falls within the competence of the Member States, national authorities are nevertheless required, when exercising that competence, to comply with their obligations deriving from EU law. More originally, **the Court confirmed for the first time that national authorities must also comply with EU effective judicial protection requirements "in the area of the financial liability of the Member States and the personal liability of judges in the event of judicial error"** (para. 111). The Court therefore held that it had jurisdiction to answer all the questions referred in these cases.

As regards admissibility, and to oversimplify as multiple inadmissibility points were raised by multiple parties, the Romanian Government, the Romanian Supreme Council of the Judiciary but also the Commission (but not necessarily in relation to the same request for a preliminary ruling) submitted that the referring courts' questions were (i) not connected with or did not bear any relation to the actual facts or purposes of the disputes in the main proceedings; (ii) not relevant anymore or (iii) concerned with the uniform application of EU law.

The Court quickly disposed of the inadmissibility claims made in relation to each of the requests. The Court did however accept that one question in Case C-195/19 concerning the first sentence of Article 9 TEU and Article 67(1) TFEU was inadmissible as "there is nothing in the request for a preliminary ruling to explain how the interpretation of those provisions might be of use to the referring court in resolving the dispute in the main proceedings" (para. 130). The same question, insofar as it relates to Article 2 TEU, was found admissible. Another question relating to Article 2 TEU was however found inadmissible in Case C-397/19 as "it is not possible from the request for a preliminary ruling to understand either the precise scope of that question or the reasons for which the referring court is uncertain whether the national provisions referred to in that question are compatible with Article 2 TEU" (para. 144). In the end, 2 questions were held inadmissible by the Court of Justice out of a grand total of 28 questions referred to it.

As regards substance, and to remain brief considering this study's primary focus on the Court's jurisdiction, the Court confirmed for the first time that the benchmarks mentioned in Decision 2006/928 are intended to ensure that Romania complies with the rule of law and are binding on Romanian authorities. The second subparagraph of Article 19(1) TEU as well – more unusually – Article 2 TEU were also relied upon by the Court and **interpreted as precluding national legislation** which:

- (i) allows a government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors in a situation where this legislation make it possible for this body to be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors;
- (ii) provides for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors in the absence of any objective justifications and specific guarantees preventing it from being used as an instrument of political control over the activity of those judges and prosecutors;
- (iii) provides that a finding of judicial error, made in proceedings to establish the State's financial liability and without the judge concerned having been heard, is binding in the subsequent proceedings relating to an action for indemnity to establish the personal liability of that judge, and where that legislation does not, in general, provide the necessary guarantees to prevent such an action for indemnity being used as an instrument of pressure on judicial activity and to ensure that the rights of defence of the judge concerned are respected;
- (iv) prohibits national ordinary courts to disapply of their own motion a national provision falling within the scope of Decision 2006/928, which they consider, in the light of a judgment of the Court of Justice, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU.

4.1.5. Judgment of 6 October 2021 (Grand Chamber) in Case C-487/19, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*¹³⁵

This request for a preliminary ruling, one of the multiple requests originating from Polish courts post *ASJP* judgment, concerned the interpretation of Article 2, Article 6(1) and (3) and the second subparagraph of Article 19(1) TEU, Article 267 TFEU and Article 47 CFR in the context of proceedings brought by Judge Żurek in relation to his forced transfer.¹³⁶ Within the framework of this specific dispute, Judge Żurek submitted an application for the recusal of all the judges comprising the so-called Chamber of Extraordinary Control and Public Affairs, another creation of Poland's current ruling

¹³⁵ EU:C:2021:798.

¹³⁶ Judge Waldemar Żurek is one of the Polish judges who have been subject to a particularly intense campaign of harassment and unlawful disciplinary measures and sanctions. See e.g., the judgment of the European Court of Human Rights of 16 June 2022 in *Żurek v Poland* (application no. 39650/18) in which the Strasbourg Court held that "the accumulation of measures taken by the authorities [...] could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence. On the material before it, the Court finds that no other plausible motive for the impugned measures has been advanced or can be discerned" (para. 227). As of 1 January 2023, Judge Żurek has two more applications pending before the ECtHR. In addition, he has secured an interim measure from the ECtHR with respect of the national cases against him pending before the body known as the Chamber of Extraordinary Review and Public Affairs which the Strasbourg Court has already held not to be a court established by law.

coalition and another chamber which has since been found not to be a court established by law by the ECtHR.¹³⁷

The referring court, namely the Civil Chamber of Poland's Supreme Court, requested the Court of Justice to clarify whether the provisions of EU law previously mentioned must be interpreted as meaning that a court composed of a single person whose appointment to the Supreme Court was marred by flagrant and deliberate breaches of domestic law is not an independent and impartial tribunal previously established by law and if so, is the referring court justified in disregarding the judicial acts of this person.

As regards the jurisdiction of the Court of Justice, Poland's Public Prosecutor General yet again claimed that the Court lacked jurisdiction on the ground that "the applicable procedural rules concerning the appointment of judges and the conditions for the validity of such appointments fall within the exclusive competence of the Member States, outside the scope of EU law" (para. 74). In response, the Court repeated what it previously held in multiple judgments which this study has previously summarised. The Polish government made the additional and more original claim that the referred questions do not fall within the preliminary ruling jurisdiction of the Court as they would not seek to obtain an interpretation of EU law but an interpretation of national law. In response, the Court easily disposed of this objection by recalling the basics of the preliminary ruling procedure before reiterating that it has jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it. The Court was then able to conclude with ease that it had jurisdiction to rule on this request for a preliminary ruling.

As regards the admissibility of the request, the Court also confirmed it was admissible on the basis of Article 19(1) TEU after dismissing several and underwhelming arguments put forward by the Polish Government and the Public Prosecutor General which repeated, in part, arguments used to challenge the jurisdiction of the Court. In other words, the Polish Government and the Public Prosecutor General claimed inter alia that Article 19(1) TEU would be not be applicable to the dispute in the main proceedings and may not, in any event, impose obligations on Member State when it comes to judicial appointments, judicial transfers, suspension of a judicial act of appointment or an appeal brought against a resolution of Poland's NCJ. In response, the Court repeated that "when exercising their competence, in particular that relating to the enactment of national rules governing the process of appointing judges and subjecting that process to judicial review, the Member States are required to comply with their obligations deriving from EU law" (para. 89). And since the arguments put forward by the Polish government concern the scope and interpretation of several provisions of EU law as well as the effect which may flow from these provisions, they obviously cannot lead to the inadmissibility of the request.

As regards substance, the Court first noted that it is not in dispute that an ordinary Polish court such as a Polish regional court "may, in that capacity, be called upon to rule on questions relating to the application or interpretation of EU law and that, therefore, as 'courts or tribunals' within the meaning of EU law, they fall within the Polish system of legal remedies in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU" (para. 105). The Court then repeated what it has constantly emphasised since it delivered its *ASJP* judgment regarding the requirement that courts be independent.

¹³⁷ ECtHR judgment of 8 November 2021 in the cases of *Dolińska-Ficek* and *Ozimek v Poland*, application nos. 49868/19 and 57511/19, CE:ECHR:2021:1108JUD004986819.

For the first time, however, the Court clarified “that the requirement of judicial independence arising from second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, requires that the rules applicable to transfer without the consent of such judges present, like the rules governing disciplinary matters, in particular the necessary guarantees to prevent any risk of that independence being jeopardised by direct or indirect external interventions. It follows that the rules and principles ... relating to the disciplinary regime applicable to judges must, *mutatis mutandis*, also apply so far as concerns such rules concerning transfers” (para. 117). In addition, one may stress another unprecedented aspect of this judgment which relates to the second subparagraph of Article 19(1) TEU but also the principle of primacy of EU law. In short, the Court held that any judicial action (in this instance, the dismissal of an application for recusal) by an individual whose judicial appointment took place in clear breach of the fundamental national fundamental rules governing the appointment of judges to the Supreme Court must be declared null and void.

4.1.6. Judgment of 16 November 2021 (Grand Chamber) in Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others*¹³⁸

In this set of Polish preliminary ruling cases, the referring court submitted questions regarding the composition of adjudicating panels called upon to rule in criminal cases pending before it considering the presence in those panels of judges seconded by Poland's Minister of Justice. The referring court was uncertain as to whether Polish rules on the secondment of judges are compatible with the second subparagraph of Article 19(1) TEU and Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings.

As regards the jurisdiction of the Court of Justice, the Polish government alongside two regional public prosecutor's offices raised their recurrent exclusive competence objection. In other words, they submitted that the Court has no jurisdiction to answer the questions submitted to it as “the procedure for appointing judges, the composition of councils of the judiciary or the secondment of judges to a court other than that in which they usually sit, and the legal effects of judgments of the national courts, fall within the exclusive competence of each Member State” (para. 34). In response, the Court reiterated, with reference to its judgment of 6 October 2021 outlined above in Section 4.1.5, that all EU Member States are required to comply with their obligations deriving from EU law, including in areas falling within their exclusive competences. Not only must EU Member States do so when it comes to “national rules relating to the adoption of decisions appointing judges and, where applicable, rules relating to the judicial review that applies in the context of such appointment procedures” but also – **and this is a new clarification** – when it comes to “national rules relating to the adoption of decisions seconding judges so that they may exercise judicial functions in another court” (para. 36). With respect to the objections linked to the actual scope of the second subparagraph of Article 19(1) TEU and Directive 2016/343, since they relate to their interpretation and the substance of the referred questions, the Court was able to rapidly dismiss them before concluding that it has manifestly jurisdiction to rule on the seven requests for a preliminary ruling it has received.

As regards the objections to the admissibility of the first question relating to Article 19(1) TEU and Directive 2016/343, they were also all dismissed by the Court, including the objection alleging that the cases in the main proceedings would fall outside the scope of the areas not harmonised by EU law as they would fall within the scope of criminal law and criminal procedure. This objection was easily dismissed as the question manifestly concerns the interpretation, scope and effects of provisions of EU

¹³⁸ EU:C:2021:931.

law on the regularity of the composition of the adjudicating panels hearing the cases in the main proceedings. Three questions were however held inadmissible by the Court on account of being purely hypothetical.

As regards substance, and to put it briefly, the Court reiterated that Polish ordinary courts are courts which may be called upon to rule on questions relating to the application or interpretation of EU law and fall within the Polish judicial system in the fields covered by Union law. They must meet therefore the requirements of effective judicial protection. These requirements but also those arising from the presumption of innocence preclude “provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period” (para. 90).

4.1.7. Judgment of 21 December 2021 (Grand Chamber) in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*¹³⁹

This judgment, which may be informally referred to as the *Romanian Judges II* judgment, is the second lengthy (+30,000 words) judgment delivered by the Court of Justice in response to a total of five requests for a preliminary ruling from Romanian courts, in this instance, the High Court of Cassation and a Regional Court. The requests were made within the framework of multiple criminal proceedings against several defendants for as well as disciplinary proceedings against a judge. As with the *Romanian Judges I* ruling, the requests were primarily concerned once again (but not exclusively) with the interpretation of Article 2 TEU and the second subparagraph of Article 19(1) TEU, Article 47 CFR and Commission Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption.

In a development reminiscent of what previously happened in Poland and Hungary, one of the referring judges in this instance was subject to a “disciplinary investigation “for failing to comply with the decisions of the Curtea Constituțională (Constitutional Court) mentioned in the questions referred for a preliminary ruling” (para. 80). Subsequently, the Court of Justice used the plural in this context and observed that “certain judges of the referring courts” were subject to disciplinary proceedings after they submitted their request for a preliminary ruling on this basis (para. 261).

As regards the jurisdiction of the Court, multiple parties to the main proceedings but also the Polish government expressed “doubts as to the jurisdiction of the Court to answer some of the questions submitted by the referring courts” (para. 129). Three series of arguments were put forward. First, in line with what the Polish, Hungarian and Romanian governments previously unsuccessfully claimed, it was submitted that the Court would lack jurisdiction because the questions relating to the compatibility with EU law of the case-law of the Romanian of the Constitutional Court “concern the organisation of the judicial system, an area in which the European Union has no competence” (para. 131). The exclusive competence objection was not new. However, and to the best of this author’s knowledge, **this was the first instance where decisions of a constitutional court were specifically presented as falling outside the scope of EU law by a national government**. Secondly, it was submitted that questions regarding the scope and effects of decisions delivered by a national constitutional court “are concerned not wit EU law but with national law” (para. 131). Thirdly, the referred questions would allegedly ask

¹³⁹ EU:C:2022:200.

the Court of Justice to review the legality of certain decisions of the Romanian Constitutional Court and as such, would fall outside the jurisdiction of the Court.

In response, the Court easily retorted that the questions referred only ask the Court to interpret specific provisions of EU law and once again reiterated that although the organisation of justice in the Member States falls within the competence of those Member States, they are nonetheless required, when exercising that competence, to comply with their obligations deriving from EU law. The Court did however add **a new clarification** when it confirmed that **"the same applies vis-à-vis the disciplinary liability of judges for failure to comply with the decisions of the national constitutional court"** (para. 133). The Court, at the same time, accepted that national rules governing the "composition of the panels hearing cases in matters of corruption and fraud" fall, in principle, within the competence of the Member States" (para. 180) and that the same is true as regards "the establishment, composition and functioning of a constitutional court" (para. 216). As previously noted, however, this of course does not mean carte blanche to ignore EU law when exercising that competence. As regards the jurisdictional objection with respect of the decisions of the Romanian Constitutional Court, the Court of Justice recalled the basics of the preliminary ruling procedure and its well-established case-law regarding its "jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility for the purposes of the case before it" (para. 135).

As regards the admissibility of specific questions, and to simplify considering the overall number of questions submitted to the Court (total of 14), traditional arguments were raised such as the alleged lack of connection of the questions with the subject matter of the dispute in the main proceedings. The Court rejected them all as none of the referred questions seeking interpretation of different provisions of EU law could be said to be unrelated to the actions in the main proceedings. Considering the focus of this study, the most interesting admissibility aspect of the judgment concerns the Court's response to the Judicial Inspection's submission that Article 2 TEU, Article 19 TEU and Article 47 CFR do not apply to the dispute in Case C-547/19.

In response, the Court first emphasised that "the referring court is called upon to rule on that procedural plea and, in that context, to rule on the legality of its own composition, taking into account the case-law established in that decision which, in its view, may call its independence into question" (para. 143) before confirming that the second subparagraph of Article 19(1) TEU is intended to apply in respect of the referring court as it is "a judicial body capable of ruling, as a court, on questions relating to the application or the interpretation of EU law and, therefore, falling within areas covered by EU law" (para. 144). As a judicial body falling within the scope of the second subparagraph of Article 19(1) TEU, the referring court must ensure that the disciplinary regime applicable to judges of the national courts which also come the scope of the second subparagraph of Article 19(1) TEU observes the principle of the independence of judges. In this context, it is worth noting that the Court of Justice stressed that "account must be taken of both Article 2 TEU and Article 47 of the Charter" (para. 144) when interpreting the second subparagraph of Article 19(1) TEU.

As regards substance, this judgment's key added value from a rule of law point of view concerns the Court's interpretation of EU judicial independence requirements and the extent to which they preclude national courts from being bound by the case law of a national constitutional court when this case law is contrary to these EU requirements and preclude national judges from being subject to disciplinary proceedings if they do so. For the Court, when a constitutional court is no longer in a position to ensure the effective judicial protection required by the second subparagraph of Article 19(1) TEU, for instance when its independence is no longer guaranteed, EU law precludes national rules or a national practice under which the decisions of the constitutional court are binding on the ordinary courts. In the absence

of evidence to the contrary, the Romanian Constitutional Court was held by the Court of Justice to fully satisfy the requirements of independence and impartiality.

However, Romanian rules were (implicitly as this is for referring courts to establish) found not compatible with Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928 as they make it possible to trigger the disciplinary liability of ordinary court judges in any situation where they fail to comply with the decisions of the national constitutional court whereas EU law requires this to be limited to the entirely exceptional cases described in the judgement. In addition, **and for the first time**, the Court unambiguously held that **where a national judge of an ordinary court takes the view that the case-law of the national constitutional court is contrary to EU law**, in particular in the light of a previous judgment of the Court of Justice, **“that national judge’s disapplication of that case-law, in accordance with the principle of the primacy of EU law, cannot in any way trigger his or her disciplinary liability”** (para. 260).

4.1.8. Judgment of 22 February 2022 (Grand Chamber) in Case C-430/21, *RS (Effects of a constitutional court rulings)*¹⁴⁰

This judgment, which may be informally referred to as *Romanian Judges III*, is the third judgment delivered by the Court of Justice in response to a request for a preliminary ruling originating from a Romanian court, in this instance, the Court of Appeal of Craiova. The factual background is rather complicated but to put it briefly, in the context of national criminal proceedings, an incidental criminal complaint was made against a prosecutor and two judges by the defendant’s wife for alleged offences of abuse of process and abuse of office. This resulted in the initiation of criminal proceedings against the judges by the special section within the Public Prosecutor’s Office specialising in the investigation of offences committed within the judicial system (SIJ), and a new action by the individual convicted on foot of the previously mentioned criminal proceedings before the referring court.

In order to rule on this later action, the Romanian referring court considered that it must examine the legislation which established the SIJ and whose compatibility with ECHR and EU rule of law standards has been repeatedly contested but whose constitutionality was however upheld by the Romanian Constitutional Court in a broader context where the Constitutional Court had begun emulating Poland’s (captured) Constitutional Tribunal and justifying the violation of previous judgments of the Court of Justice on account inter alia of Romania’s constitutional identity and “the contention that the Court as exceeded its jurisdiction” (para. 68).

The referring court decided therefore to ask the Court of Justice whether Article 2, the second subparagraph of Article 19(1) TEU and Article 47 CFR must be interpreted as precluding the case-law of Romania’s Constitutional Court which itself prevented Romanian ordinary courts from examining the conformity with EU law of national legislation found to be constitutional by the Constitutional Court with a risk of exposure to disciplinary proceedings for ordinary court judges doing so. This was not a mere theoretical risk as the Court of Justice explicitly mentioned the initiation of disciplinary proceedings “against a judge who found, in proceedings comparable to those at issue in the main proceedings, that the Romanian legislation establishing the SIJ is contrary to EU law” (para. 24). Unusually, this preliminary case was determined pursuant to the expedited procedure “in view of the fundamental importance for Romania and the EU legal order of the questions relating to the relationships between the ordinary courts and the constitutional court of that Member State, as well as to the principle of judicial independence and the primacy of EU law” (para. 32).

¹⁴⁰ EU:C:2022:99.

As regards the jurisdiction of the Court, it is worth noting that the **Romanian government seemingly did not seek to challenge it** in this instance. This judgment remains however of relevance for this study as it confirmed the different scopes of application of Article 47 CFR versus the second subparagraph of Article 19(1) TEU.

For the Court, as it is not apparent that the applicant in the main proceedings “relies on a right conferred on him by a provision of EU law, nor that he is the subject of proceedings which constitute an implementation of EU law” (para. 36), it follows that **Article 47 CFR is not, as such, applicable to the case in the main proceedings**. This does not mean that Article 47 CFR cannot be taken into account at all. Indeed, “since the second subparagraph of Article 19(1) TEU requires all Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, within the meaning in particular of Article 47 of the Charter, that latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU”. **The latter provision is furthermore fully applicable**, contrary to Article 47 CFR in this case, as the referring court is a court within the meaning of EU law which may be called upon to rule on questions related to the application or interpretation of EU law and thus comes within its judicial system in the fields covered by EU law. This means that the Court of Justice has jurisdiction to answer the questions submitted by the referring court relating to the second subparagraph of Article 19(1) TEU as well as Article 2 TEU and Decision 2006/928.

As regards substance, the Court of Justice held **for the first time** that these provisions of EU law **preclude national rules or practices which prevent national ordinary courts from assessing the compatibility with EU law of national legislation which the constitutional court of the relevant Member State has found to be consistent with a national constitutional provision** providing for the primacy of EU law.

As regards the compatibility of the national legislation establishing the SIIJ with the second subparagraph of Article 19(1) TEU, the Court recalled that it has already held in its judgment of 18 May 2021 (*Romanian judges I*) “that such national legislation falls within the scope of Decision 2006/928 and that it must, therefore, comply with the requirements arising from EU law, and in particular from Article 2 and Article 19(1) TEU”, the latter having direct effect (para. 57). It is therefore for ordinary Romanian courts to disapply the national legislation if it is not possible to interpret it in a manner consistent with the second subparagraph of Article 19(1) TEU and for ordinary Romanian courts, if necessary, to disregard the rulings of a constitutional court which they consider to be contrary to EU law.

As regards the compatibility with EU law of national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court of Justice, thereby departing from case-law of the constitutional court of the Member State concerned, such national rules or practice must be unsurprisingly held incompatible with the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law.

4.1.9. Judgment of 29 March 2022 (Grand Chamber) in Case C-132/20, *Getin Noble Bank*¹⁴¹

This request from a preliminary ruling originating from Poland raised multiple questions primarily relating to Article 19(1) TEU and Article 47 CFR in the context of a loan agreement dispute governed by

¹⁴¹ EU:C:2022:235.

EU law (i.e., Directive 93/13 on unfair terms in consumer contracts) and was particularly **unusual both from an admissibility and substantive point of view.**

Regarding the latter, and to simplify, the Court of Justice was asked to clarify whether Polish judges appointed at a time when Poland was not a democratic regime meet EU requirements relating to effective judicial protection. Regarding the former, which is the main focus of this study, the Court of Justice was asked to answer judicial independence related questions submitted by an individual **whose own appointment to Poland's Supreme Court was previously held by the European Court of Human Rights on 3 February 2022¹⁴² to be grossly defective** due inter alia to the involvement of Poland's neo-National Council of the Judiciary – a body lacking independence and subsequently found to be unconstitutional by the criminal chamber of Poland's Supreme Court on 2 June 2022¹⁴³ – in addition to having been made in violation of an interim order of the Supreme Administrative Court by the Polish President:

1. The Court has established that, on two counts, there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Civil Chamber of the Supreme Court. First, the appointment was made upon a recommendation of the NCJ, as established under the 2017 Amending Act, a body which no longer offered sufficient guarantees of independence from the legislative or executive powers. Second, the Polish legislature intervened in the process of appointments by extinguishing the effects of the pending judicial review of NCJ resolution no. 330/2018, and the President of Poland, despite the fact that the implementation of that resolution – whereby seven judges of the Civil Chamber had been recommended for appointment, including those who had dealt with the applicant company's case – had been stayed by the Supreme Administrative Court and that the legal validity of that resolution was yet to be determined by that court, appointed them to judicial office in manifest disregard for the rule of law.

These irregularities in the appointment process compromised the legitimacy of the formation of the Civil Chamber of the Supreme Court which examined the applicant company's case to the extent that, following an inherently deficient procedure for judicial appointments, it did 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.

2. In the light of the foregoing, and having regard to its overall assessment under the three-step test set out above, the Court concludes that the formation of the Civil Chamber of the Supreme Court, which examined the applicant company's case, was not a "tribunal established by law".

3. Accordingly, there has been a violation of Article 6 § 1 of the Convention in that regard.¹⁴⁴

The Court of Justice, however, and on the basis of a reasoning which may utterly fail to convince, found the request admissible. The Court did so notwithstanding the ECtHR' judgment of 3 February 2022 cited above and the growing case-law from the Strasbourg Court regarding **the systemic deficiencies** which have **adversely affected all the appointments** made to Poland's Supreme Court since 2018 and which the ECtHR also held to be "capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts".¹⁴⁵

¹⁴² Judgment of 3 February 2022, *Advance Pharma sp. z o.o. v Poland*, application no. 1469/20, CE:ECHR:2022:0203JUD000146920.

¹⁴³ Case I KZP 2/22.

¹⁴⁴ *Advance Pharma*, op. cit., CE:ECHR:2022:0203JUD000146920.

¹⁴⁵ Ibid., para. 364.

In the alleged absence of information relating to the individual who submitted the request for a preliminary ruling in Case C-132/20, or other evidence capable of rebutting the presumption that the body which formally submitted the request, irrespective of its actual composition, meets the requirements that allow it to be considered to be a court within the meaning of EU law (e.g., the requirements that a court be established by law and independent), **the Court of Justice held the referred questions to be admissible.**

This reasoning is difficult to reconcile with the fact that the Polish Ombudsman, a party to these proceedings, did raise the inadmissibility of the request “on account of the flaws in the appointment” (para. 61) of the referring individual and provided evidence that the referring individual was not a court established by law both within the meaning of EU but also ECHR law. The Commission, while it refrained from arguing that the request is inadmissible, also expressed doubts “as to whether the said judge satisfies the requirement for a ‘tribunal previously established by law’ under Article 19(1) TEU and Article 47 of the Charter” (para. 65). In addition, the violation of the interim order of the Supreme Administrative Court in relation to multiple appointments to the Supreme Court and the Supreme Court’s (binding and final) Resolution of 23 January 2020 implementing inter alia the Court of Justice’s own judgment in *AK* are inexplicably not taken into account by the Court of Justice when examining the admissibility of the request. This is surprising considering that these rulings had been previously comprehensively analysed by Advocate General Tanchev in his opinions in Case C-487/19 and C-508/19.¹⁴⁶

Be that as it may, **the Court of Justice “refused to make an autonomous assessment of the legality (appointment) of the judge who constituted the referring court”**¹⁴⁷. The Court did however accept that the presumption of admissibility of any request originating (formally speaking) from a national court may “be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter” (para. 72). It is however for the parties to make the Court aware of such final decisions before the closure of the oral part of the procedure even in a situation where the Court’s own previous case law referred to relevant national and/or ECtHR judgments, which is a surprising position to say the least.

This means that **individuals appointed to judicial positions on the back of manifest and grave irregularities may submit requests for a preliminary ruling to the Court of Justice.** The Court has decided, in essence, that what amounts to a lawfully established court is no longer an EU law question for the Court and delegated this type of assessment to national or even “international” courts. The Court will find them admissible until such time – usually years – before a final national or international judgment is delivered, in practice, the sole European Court of Human Rights as those seeking to undermine the rule of law tends to first target courts of final instance, which renders half of the solution devised by the Court of Justice utterly illusory. In the meantime, every judgment rendered by these individuals, alone or as part of a bench, may be successfully challenged before (properly composed) national courts and/or the ECtHR on the ground that they have not been issued by a lawful court. It also means that the Court of Justice may deliver preliminary rulings which cannot be lawfully implemented by the referring bodies themselves consisting in part or in full of what may only be

¹⁴⁶ Opinions of AG Tanchev delivered on 15 April 2021 in Case C-487/19 *W.Ż.*, EU:C:2021:289 and Case C-508/19, *M.F.*, EU:C:2021:290.

¹⁴⁷ P. Filipek, “Drifting Case-law on Judicial Independence: A Double Standard as to What Is a ‘Court’ Under EU Law?”, *VerfBlog*, 13 May 2022: <https://verfassungsblog.de/drifting-case-law-on-judicial-independence/>

described as usurpers as the Court of Justice itself stressed that it cannot be inferred from its judgment in the present case “that the conditions for appointment of the judges that make up the referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter” (para. 74).

In the present case, the key conclusion one may derive from *Getin Noble Bank* is that requests for a preliminary ruling regarding, for instance, the interpretation of the principle of independence and impartiality of tribunals under the second subparagraph of Article 19(1) TEU and Article 47 CFR **may be presumed to be admissible even though and paradoxically, they may originate from a referring body which, itself, does not satisfy the requirements of being an independent and impartial tribunal previously established by law** under the second subparagraph of Article 19(1) TEU or Article 47 CFR. In this situation, however, the referring body cannot lawfully adjudicate the dispute pending before it and on the basis of which, it has submitted a request for a preliminary ruling.

4.1.10. Forthcoming judgment in Case C-817/21, *Inspekția Judiciară*

The Court of Justice is due to issue yet another important rule of law judgment in a case which may be informally referred to as *Romanian Judges IV* as this fourth preliminary case which originates from yet another Romanian court, in this instance, the Court of Appeal of Bucharest.

This preliminary request primarily concerns the judicial body responsible for the conduct of disciplinary investigations and the commencement of disciplinary proceedings against judges and prosecutors in Romania. The referring court, seized of an annulment action against the dismissal by the Judicial Inspectorate of several disciplinary complaints made against judges and prosecutors engaged in criminal proceedings against the applicant, is uncertain whether a body, such as the Judicial Inspectorate, must offer the same guarantees of independence and impartiality as are required of courts under EU law and in particular the second subparagraph of Article 19(1) TEU.

The Court is yet to deliver its judgment at the time of finalising this study. AG Collins did however deliver his Opinion in this Case on 26 January 2023.¹⁴⁸ It is worth noting that contrary to its previous initial stance, **the Romanian government did not challenge the jurisdiction of the Court** with only the Judicial Inspectorate raising the inadmissibility of the question submitted to the Court on two grounds: (i) the referring court would seek an interpretation of national rather than EU law and (ii) no provision of national law would have been found contrary to EU law. For AG Collins, these two objections must however be dismissed as (i) it is obvious that the referring court does seek a ruling on the interpretation of EU law (Article 2 TEU, the second subparagraph of Article 19(1) TEU and Decision 2006/928) and (ii) the Judicial Inspectorate's second objection concerns the substance of the very question referred by the Court of Appeal rather than admissibility issues.

As regards substance, and to remain brief, AG Collins submitted that a law adopted in 2018 “appears to amount to a regression in the protection of the rule of law in Romania” as it “may undermine considerably the public perception that the Deputy Chief Inspector can oversee disciplinary investigations and proceedings regarding complaints against the Chief Inspector in an objective and impartial manner” (para. 51). **If the Court of Justice were to follow, this would be the first time EU law is interpreted as precluding a law on the basis of the non-regression principle beyond Poland.**

¹⁴⁸ EU:C:2023:55.

4.1.11. Forthcoming judgments in Joined Cases C-615/20 and C-671/20, YP and Others (Lifting of a judge's immunity and his or her suspension from duties) and Joined C-181/21 and C-269/21, G. and Others (Appointment of judges to the ordinary courts in Poland)

These four requests for a preliminary ruling originate again from several Polish judges, **one of whom – Judge Igor Tuleya – was able to submit the request on the last day before his (unlawful) suspension from duties** was (unlawfully) enforced by the President of the Court where the judge sits.¹⁴⁹

In Case C-615/20, the referring court in which Judge Tuleya normally sits (in practice Judge Tuleya himself as noted above) submitted issues relating to (i) the then continuing functioning of the Disciplinary Chamber notwithstanding inter alia the Supreme Court's Resolution of 23 January 2020 holding the Disciplinary Chamber not to be a court established by law under the Polish Constitution, EU law and ECHR law; and (ii) the consequences of its decisions lifting the judicial immunity of judges involved in criminal proceedings in the light of the reallocation of all Judge Tuleya's cases following the lifting of his judicial immunity on 18 November 2020. For the referring court, this situation is contrary to Article 47 CFR with the referring court also requesting inter alia the Court of Justice to clarify whether the second subparagraph of Article 19(1) TEU (i) covers national provisions relating to the criminal prosecution or detention of a judge of a national court and (ii) precludes decisions lifting judicial immunities from having binding effect if granted by a body such as the Disciplinary Chamber which is not a court established by law.

In Case C-671/20, the referring judge to whom the President of Regional Court in Warsaw reassigned the cases initially assigned to Judge Tuleya raised similar issues as regards the binding nature and effect of (unlawful) decisions by a body such as the Disciplinary Chamber in the light in particular of the second subparagraph of Article 19(1) TEU. However, in this case, the Court of Justice is primarily asked to clarify the consequences of these decisions not only on the judges (unlawfully) suspended but also on other judges impacted by the knock-on effects of these suspensions. The referring judge – the President of the chamber in which Judge Tuleya sat and who was ordered to change the formation of the bench in all of the cases initially assigned to that judge – is concerned inter alia that this chamber may no longer constitute a tribunal previously established by law under EU law following the alteration of its composition by order of the President of the Regional Court following Judge Tuleya's suspension.

Cases C-615/20 and C-671/20 were joined by the President of the Court. To begin with, it is worth noting that the Polish government did not seemingly seek to challenge the jurisdiction of the Court to challenge instead the admissibility of the requests on account mainly of the alleged lack of any connecting factor between the matters at issue in the national proceedings and the provisions of EU law of which the referring court seeks an interpretation. In his Opinion delivered on 15 December 2022, **AG Collins advised the Court to dismiss the Polish government's admissibility objections** as the "the interpretation of EU law sought by the referring court is required to enable it to resolve a procedural question raised *in limine litis* prior to ruling on the criminal proceedings of which it is seised" (para. 49).¹⁵⁰

¹⁴⁹ "Judge Tuleya asks EU court in his last ruling", *Rule of Law in Poland*, 23 November 2020: <https://ruleoflaw.pl/judge-tuleya-asks-eu-court-in-his-last-ruling/>.

¹⁵⁰ EU:C:2022:986.

In Case C-182/21 and in Case C-269/21, which were also joined by the Court of Justice, a judge of the Regional Court of Katowice and a judge of the Regional Court of Kraków asked the Court of Justice to interpret the principle of prior establishment by law of a court or tribunal recognised by the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 CFR, so as to enable them to ascertain whether judicial appointments made to Polish ordinary courts post-2018 in procedures involving an unconstitutional body lacking independence is compatible with EU law. They did so in the context of two disputes relating to loan agreements governed by the national law that transposed Council Directive 93/13 on unfair terms in consumer contracts.

In line with its position in Cases C-615/20 and C-671/20, the Polish government did not seek to challenge the jurisdiction of the Court to challenge instead the admissibility of the requests. The Polish government did so however on many more grounds than in these two cases and relied on objections it previously used to deny the Court any jurisdiction to review its “judicial reforms” as they would allegedly fall within the exclusive competence of that Member State. More originally, but a claim one may find difficult to understand, the Polish government claimed that the Court’s judgement of 15 July 2021 in *Commission v Poland (Disciplinary regime for judges)* “is akin to a legislative act”.¹⁵¹ In addition, the Polish government argued that its position on the lack of competence of the EU regarding national judicial matters is supported by the decisions of Poland’s (irregularly composed and presided) Constitutional Tribunal:

That position is reflected to some extent in the judgment of the Trybunał Konstytucyjny (Constitutional Court, Poland) of 14 July 2021 in Case P 7/20, in which it held, inter alia, that the second subparagraph of Article 4(3) TEU, read in conjunction with Article 279 TFEU, is incompatible with Articles 2 and 7, Article 8(1) and Article 90(1) of the Constitution of the Republic of Poland, read in combination with Article 4(1) thereof. The Trybunał Konstytucyjny (Constitutional Court) thus considered that the Court of Justice had ruled ultra vires when it adopted interim measures directed to the Republic of Poland relating to the organisation and jurisdiction of the Polish courts and the procedures to be followed before them.¹⁵²

The rest of the objections relied on traditional and accepted grounds to challenge the admissibility of the questions referred such as their hypothetical nature, their failure to comply with the requirements of Article 94 of the Rules of Procedure, etc. One may note that the Commission also objected to the admissibility of the questions in Case C-269/21 as the referring court would have failed to demonstrate the extent to which the questions referred are necessary in order to resolve the dispute pending before it.

For AG Collins, however, the Court should dismiss all of the objections as to the admissibility of the questions asked by the referring courts. In his Opinion, the Advocate General recalled the settled case-law of the Court in response to the exclusive competence line of reasoning repeated ad nauseam by the Polish government ever since the Court decided its first case in relation to Poland’s so-called judicial “reforms” which have been repeatedly found incompatible with rule of law requirements by (independent) Polish courts as well as the Court of Justice and the European Court of Human Rights in dozens and dozens of rulings. In a succinct summary, AG Collins observed that Article 2 TEU and the second subparagraph of Article 19(1) TEU “have a transversal character and apply whenever a jurisdiction may be required to rule upon cases ‘in fields covered by Union law’”.¹⁵³

¹⁵¹ Opinion of AG Collins delivered on 15 December 2022 in Joined C-181/21 and C-269/21, *G. and Others (Appointment of judges to the ordinary courts in Poland)*, EU:C:2022:990, para. 23.

¹⁵² Ibid., para. 23.

¹⁵³ Ibid., para. 34.

As regards the rest of the Polish government's objections, they either primarily relate to the EU law substance of the questions referred or the lack of jurisdiction of the referring courts themselves. These objections must also be rejected according to AG Collins as, on the one hand, it is settled case-law that objections relating to substance are, by their very nature, incapable of justifying a finding that those questions are inadmissible and, on the other hand, it is also settled case-law that it is not for the Court of Justice to determine whether the order for reference was made in accordance with the rules of national law.

Finally, for AG Collins, the Commission's objection must also be rejected as the referring court has in fact shown how "the Court's answer to the questions on the interpretation of EU law referred to it in Case C-269/21 may be necessary to enable the referring court to resolve issues of national *procedural* law before it can rule on the *substance* of the dispute pending before it" (emphasis added).¹⁵⁴

4.2. Unsuccessful reliance

4.2.1. Judgment of 26 March 2020 (Grand Chamber) in Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny*¹⁵⁵

These two requests for a preliminary ruling concern the interpretation of the second subparagraph of Article 19(1) TEU. They were submitted by two Regional Court judges and lodged with the Court of Justice in September 2018, that is, **a few months after the Court's ASJP judgment and before the Court delivered its judgment in the first infringement case lodged with it by the Commission.**

The two referring judges were quickly subject to disciplinary proceedings with each of them receiving a "form from an assistant to the disciplinary officer responsible for cases relating to judges in the ordinary courts a summons to attend a hearing, as witnesses, concerning the grounds which led them to refer those questions and the issue whether judicial independence could have been undermined by the fact that the two judges in question did not adopt their respective orders for reference independently" (para. 20), the later allegation having no foundation whatsoever one may add. The Polish Ombudsman furthermore drew the Court of Justice's attention to the fact that Poland's National Prosecutor had since "brought an action before the Disciplinary Chamber of the Supreme Court to waive immunity for the judge who made the reference for a preliminary ruling in Case C-563/18 and to authorise criminal proceedings against that judge" (para. 26). This referring judge in this case was Judge Tuleya. As outlined above in Section 4.1.11, he was unlawfully suspended on 18 November 2020 with his unlawful suspension lasting until 29 November 2022.¹⁵⁶

The jurisdiction of the Court of Justice was challenged by the Polish government on two main grounds: (i) the disputes in the main proceedings would be purely domestic in nature and do not fall within the areas covered by EU law, and (ii) national provisions relating to the organisation of national courts and the disciplinary measures applicable to judges would fall within the exclusive competence of the Member States and therefore also outside the scope of EU law.

¹⁵⁴ Ibid, para. 40.

¹⁵⁵ EU:C:2020:234.

¹⁵⁶ On 29 November 2022, the new Chamber of Professional Responsibility – itself arguably not a court established by law similarly to the Disciplinary Chamber which it replaced – reinstated Judge Tuleya and closed the waiving of immunity proceedings against him. However, this new body, composed of a majority of individuals who cannot lawfully adjudicate, indicated that immunity proceedings could be reopened, therefore leaving Judge Tuleya under the permanent threat of new, unlawful proceedings and suspension.

In response, the Court reiterated what it had previously held in its judgments of 27 February 2018 in Case C-64/16, *ASJP* and of 5 November 2019 in Case C-192/18, *Commission v Poland (Independence of ordinary courts)*. To begin with, the second subparagraph of Article 19(1) TEU, which refers to the 'fields covered by Union law', may apply irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) CFR. Secondly, 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. In the present instance, it is obvious that the referring courts may be called upon, in their capacity as ordinary Polish courts, to rule on questions relating to the application or interpretation of EU law and come under the Polish judicial system in the 'fields covered by Union law'. Finally, the Court recalled 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 and, in particular, from the second subparagraph of Article 19(1) TEU" (para. 36). In conclusion, **the Court held that it had jurisdiction to interpret the second subparagraph of Article 19(1) TEU.**

As regards admissibility, however, **the Court held that the two requests for a preliminary ruling must be declared inadmissible** as submitted by the Polish government but also the Commission on account of the lack of a connecting factor between the disputes pending before the referring courts and the second subparagraph of Article 19(1) TEU to which the questions referred by the two Polish judges relate.

For the Court, the present requests can be distinguished from its *ASJP* judgment of 27 February 2018, "in which the referring court had to rule on an action seeking annulment of administrative decisions reducing the remuneration of the members of the Tribunal de Contas (Court of Auditors, Portugal) pursuant to national legislation which provided for such a reduction and whose compatibility with the second subparagraph of Article 19(1) TEU was challenged before that referring court" (para. 49). Furthermore, the Court found that the questions referred do not require an interpretation of EU law which would allow them to resolve procedural aspects allowing them to rule on the substance of the disputes before them. The present requests can therefore be distinguished from the cases giving rise to the Court's judgment of 19 November 2019 in *AK* "in which the interpretation sought from the Court was such as to have a bearing on the issue of determining which court had jurisdiction for the purposes of settling disputes relating to EU law" (para. 51). **As the questions referred were found to be of a general nature, the Court held the two requests for a preliminary ruling inadmissible.**

Arguably, the most unconvincing aspect of the Court's judgement relates to the disciplinary investigations launched against the referring judges for the very act of submitting the present requests for a preliminary ruling. For the Court, 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", with the Court also mentioning that "those investigation proceedings have since been closed" (para. 54). While the Court does establish that the mere prospect 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 not compatible with EU law, **disciplinary action against a referring judge does not make the reference automatically admissible as a matter of EU law according to the Court.**

4.2.2. Judgment of 23 November 2021 (Grand Chamber) in Case C-564/19, *IS (Illegality of the order for reference)*¹⁵⁷

In the context of criminal proceedings brought against a Swedish national, the Hungarian referring judge submitted multiple questions to the Court of Justice regarding the accused's right to be informed of his rights and his rights of defence. This preliminary case quickly attracted attention as the **referring judge was subject to disciplinary proceedings on 25 October 2019** – which were subsequently discontinued as Hungarian authorities had done enough to create a chilling effect on other judges – while the (captured) Hungarian Prosecutor General involved the (captured) Hungarian Supreme Court to essentially give a veneer of legality of the effective systemic neutralisation of the preliminary ruling procedure when it comes to asking judicial independence related questions to the Court of Justice. For reasons difficult to understand, **the Commission did not launch an infringement action** and instead expressed “concerns” via the Annual Rule of Law Report mechanism.¹⁵⁸

To merely focus on aspects relating to the jurisdiction of the Court, it is worth noting that contrary to the usual practice of the current Polish government, **the Hungarian government did not seek challenge the Court's jurisdiction** on the ground that the EU lacks competence as regards the organisation of national justice systems. Instead, the **Hungarian government challenged the admissibility of the questions** and in particular the question asking the Court whether the second subparagraph of Article 19(1) TEU, Article 47 CFR and Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she made a request for a preliminary ruling. For the Hungarian government – and more surprisingly, the Commission as well – this question must be declared inadmissible mainly because of the alleged irrelevance or lack of information on the effects of the initiation of disciplinary proceedings, since withdrawn and closed, against the referring judge.

The Court did not agree, and unlike the requests from the two Polish judges examined above, the Court **held this question admissible**. In this instance, the Court found that “the referring judge is faced with a procedural obstacle, arising from the application of national legislation against him, which he must address before he can decide the main proceedings without external interference, and therefore, in accordance with Article 47 of the Charter, in complete independence” (para. 87). For the Court, **this is a key difference with the judgment of 26 March 2020 in *Miasto Łowicz and Prokurator Generalny*** “in which the answers to the questions of interpretation of EU law referred to the Court would not have been necessary for the referring courts concerned in order to resolve procedural questions of national law before being able to rule on the substance of the disputes before them” whereas, in the present instance, the Hungarian referring judge “is uncertain as to the conditions for the continuation of the main proceedings following the *Kúria* decision declaring the initial request for a preliminary ruling unlawful and which also served as a ground for commencing disciplinary proceedings against him” (para. 87).

The referred question regarding the compatibility of disciplinary proceedings against judges for making a reference with the second subparagraph of Article 19(1) TEU, Article 47 CFR and Article 267 TFEU is therefore admissible. However, **the Court did not provide, as requested by the referring**

¹⁵⁷ EU:C:2021:949.

¹⁵⁸ 2020 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, 30 September 2020, p. 1: “Developments related to the Supreme Court (*Kúria*) also raise concerns, notably its decision to declare unlawful a request for preliminary ruling to the European Court of Justice” and p. 4: “in October 2019, the *ad interim* president of the Budapest Regional Court [...] referring explicitly to the judgment of the *Kúria*, initiated disciplinary proceedings against the judge who issued the preliminary reference”.

judge, an interpretation of the second subparagraph of Article 19(1) TEU and Article 47 CFR. Instead, the Court dealt with this systemically important case from a rule of law point of view on the sole basis of Article 267 TFEU insofar as the issues of disciplinary proceedings and the (captured¹⁵⁹) Supreme Court's attempts to neutralise the functioning of the preliminary ruling procedure are concerned. The Court did so on account of the *procedural* nature of the issue which calls into question the powers of the referring judge under Article 267 TFEU. Judicial independence was nevertheless and aptly mentioned in the Court's reasoning. Indeed, the fact that national judges may not be exposed to disciplinary proceedings or measures for having exercised the discretion to make a reference for a preliminary ruling to the Court "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" (para. 91).

As regards the questions asking whether the principle of judicial independence, enshrined in Article 19 TEU and Article 47 CFR, must be interpreted as (i) precluding the (captured¹⁶⁰) President of the National Office for the Judiciary (NOJ) from appointing the president of a court, by circumventing normal procedures and having recourse to direct temporary appointments and (ii) precluding a remuneration system which provides that judges receive lower remuneration than prosecutors of the same category and allows discretionary bonuses to be awarded, **their admissibility was again disputed by both the Hungarian government and the Commission on account of their irrelevance for the purposes of resolving the dispute.**

With reference to its judgment of 26 March 2020 in *Miasto Łowicz and Prokurator Generalny*, **the Court agreed due mainly to the absence of a connecting factor between the provisions of EU law previously mentioned and the dispute in the main proceedings.** In this respect, it is worth noting that the Court unusually accepted the overall diagnosis of the AG regarding the "Hungarian judicial system as a whole, of which some aspects may undermine the independence of the judiciary and, more particularly, that of the referring court in its implementation of EU law" (para. 144). However, "the fact that there may be a material connection between the substance of the main proceedings and Article 47 of the Charter, if not more broadly with Article 19 TEU, is not sufficient to satisfy the criterion of necessity, referred to in Article 267 TFEU. In order to do so, it would be necessary for the interpretation of those provisions [...] to be objectively required for the decision on the merits of the main proceedings, which is not the case here" (para. 144).

While this judgement is therefore significant from a rule of law point of view by holding that disciplinary proceedings against judges for making use of Article 267 TFEU is not compatible with EU law and confirming that national courts must disregard any national judicial practice which is prejudicial to their right to make a reference under Article 267 TFEU, the Court did so without relying on Article 19(1) TEU and Article 47 CFR. In addition, the Court held inadmissible the two questions which exclusively

¹⁵⁹ 2021 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, SWD(2021) 714 final, 20 July 2021, p. 1: "The new rules allowing for appointment of members of the Constitutional Court to the Supreme Court (*Kúria*) outside the normal procedure, have been put in practice, and enabled the election of the new *Kúria* President, whose position was also endowed with additional powers. This *Kúria* President was elected despite a negative opinion of the National Judicial Council."

¹⁶⁰ 2020 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, 30 September 2020, p. 3: "the National Judicial Council criticised the previous NOJ President for having breached the law when annulling the procedures for selecting court presidents and discretionarily appointing *ad interim* court presidents without the approval of the National Judicial Council. This situation led the National Judicial Council to formally request Parliament to remove the NOJ President. The competent parliamentary committee examined that request and, in June 2019, Parliament rejected it."

requested an interpretation of these two provisions as regards the powers of the President of the NOJ and judges' salaries.

4.2.3. Judgment of 22 March 2022 (Grand Chamber) in Case C-508/19, *Prokurator Generalny (Disciplinary Chamber of the Supreme Court – Appointment)*¹⁶¹

This preliminary ruling primarily concerns the interpretation of the second subparagraph of Article 19(1) TEU and Article 47 CFR and finds its origins in the harassment of yet another Polish judge known for defending the rule of law in Poland via repeated, arbitrary disciplinary proceedings.¹⁶² In the present instance, Polish Judge Monika Frąckowiak, who is also currently the Vice-President of MEDEL (Magistrats européens pour la démocratie et les libertés), challenged the legal status as Supreme Court judge of the (irregularly appointed¹⁶³) President of the (unlawful¹⁶⁴) Disciplinary Chamber of Poland's Supreme Court via a civil action brought before the Labour and Social Insurance Chamber of the same Supreme Court. Through her action, Judge Frąckowiak sought to obtain a declaration that a service relationship does not exist between this individual and the Supreme Court. Within the framework of the same action, Judge Frąckowiak also asked the Labour and Social Insurance Chamber to suspend the disciplinary proceedings initiated against her by the Deputy Disciplinary Officer responsible for cases concerning judges sitting in the ordinary courts, and set in motion by the President of the Disciplinary Chamber, for alleged delays in handling the cases on which Judge Frąckowiak was called upon to rule.

While accepting that an action seeking a declaration that a judge's mandate does not exist is not a civil case, the Labour and Social Insurance Chamber considered that EU law might provide it with the jurisdiction to examine this action and find Judge Frąckowiak's request for an interim measure admissible. Due to the complex and novel nature of these issues, the Labour and Social Insurance Chamber decided to stay the proceedings and referred a total of five questions which primarily concerned EU requirements relating to the principle of effective judicial protection under the second subparagraph of Article 19(1) read in conjunction with Article 47 CFR.

In this case, the Public Prosecutor, rather than the Polish government, challenged the jurisdiction of the Court with both the Public Prosecutor and the Polish government challenging also the admissibility of the request for a preliminary ruling.

As regards the jurisdiction of the Court, the Public Prosecutor first submitted that the subject matter of the proceedings would be a purely internal case falling within the exclusive competence of the Member States. It follows that the Court has no jurisdiction to reply to the request. More originally, the Public Prosecutor denied the applicability of the second subparagraph of Article 19(1) TEU by submitting that this provision would be irrelevant as the referring court is not called upon to apply EU law in the case before it while the involvement of the Disciplinary Chamber President is similarly purely procedural in nature. In response, the Court quickly disposed of these objections by recalling its settled case-law whereby EU Member States, when exercising their competence regarding the organisation of national judiciaries, remain under an obligation to comply with EU law, "in particular, as regards national rules relating to the adoption of decisions appointing judges and, where applicable, rules

¹⁶¹ EU:C:2022:201.

¹⁶² See Interview with Judge Monika Frąckowiak: The authorities have demolished the system in Poland, *Rule of Law in Poland*, 30 May 2022: <https://ruleoflaw.pl/judge-monika-frackowiak-the-authorities-have-demolished-the-system-in-poland/>.

¹⁶³ See Opinion of AG Tanchev in Case C-508/19, EU:C:2021:290 and ECtHR judgment of 22 July 2021 in *Reczkowicz v Poland*, application no. 43447/19, CE:ECHR:2021:0722JUD004344719.

¹⁶⁴ Ibid. See also Resolution of the joint Chambers of the Poland's Supreme Court of 23 January 2020, BSA I-4110-1/2.

relating to the judicial review that applies in the context of such appointment procedures and that of the rules governing the disciplinary regime applicable to judges" (para. 56). With respect of the additional arguments put forward by the Public Prosecutor, since they relate to the interpretation of the scope of the second subparagraph of Article 19(1) TEU, it is therefore evident that such an interpretation falls within the preliminary ruling jurisdiction of the Court. **The Court, therefore, effortlessly concluded that it has jurisdiction to rule on the request for a preliminary ruling.**

As regards admissibility, the Public Prosecutor and the Polish Government raised various objections but rather than detailing them, the Court decided to summarise its settled case-law before examining the nature of the dispute in the main proceedings and reformulated the main aim of the action brought by Judge Frąckowiak. For the Court, Judge Frąckowiak, "is in fact seeking, in essence, to challenge the decision" (para. 63) by which the President of the DC designated the disciplinary court to hear the disciplinary proceedings brought against her via a civil action alleging the lack of service relationship between the President of the DC and the Supreme Court. This means, according to the Court, that the questions referred to it "relate intrinsically to a dispute other than that in the main proceedings, to which the latter is in fact merely incidental" (para. 70). The Court furthermore held that the request for a preliminary ruling in that case effectively "seeks, in essence" (para. 81) the invalidation *erga omnes* of the appointment of a judge of the Supreme Court, even though national law does not authorise challenges to the appointment of a judge by way of a direct action for the annulment of such an appointment.

This Court's reasoning may fail to convince. For instance, the Court suggests that Judge Frąckowiak could have raised before the disciplinary court an objection alleging a possible infringement of her right to have the disciplinary proceedings determined by an independent and impartial tribunal previously established by law. This suggestion however fails to take account of the fact that the relevant Polish rules granting jurisdiction to this disciplinary have since been found to be incompatible with the requirement derived from the second subparagraph of Article 19(1) TEU. In addition, the Court fails to recognise that during the course of these proceedings the second subparagraph of Article 19(1) TEU and connected case law have been held "unconstitutional" by Poland's (irregularly composed) Constitutional Tribunal. Finally, the Court equally omits to take any account of the fact that Polish judges applying the second subparagraph of Article 19(1) TEU, as interpreted by the Court, face real and serious risks of disciplinary proceedings and sanctions. The alternative procedural path the Court identifies in relation to Judge Frąckowiak is therefore illusory.

Be that as it may, and to return to admissibility issues, the Court concluded "that **the questions referred to the Court in the present reference for a preliminary ruling go beyond the scope of the duties of the Court under Article 267 TFEU**" (para. 82) **and must therefore be declared inadmissible.**

One may contrast the Court's (unpersuasive) admissibility assessment with the one made by AG Tanchev in his Opinion delivered on 15 April 2021 and according to whom all of the five questions referred should be held admissible.¹⁶⁵ According to the AG, the first three questions "seek in essence to determine whether the second subparagraph of Article 19(1) TEU should be interpreted as opposing the effectiveness of J.M.'s appointment to the post of judge in the Disciplinary Chamber. Indeed, it is not necessary that the court concerned by the questions referred is called upon to rule, *in the case at issue*, on the basis of EU law, given that the scope of that provision extends to all courts or tribunals

¹⁶⁵ Opinion of AG Tanchev in Case C-508/19, EU:C:2021:290. The Commission and the Polish Ombudsman also submitted that the questions referred are admissible.

with jurisdiction to rule on the application or interpretation of EU law, which is the case in respect of the Disciplinary Chamber" (para. 14). As regards the last two questions, they "seek to obtain guidance on EU law for the referring court so it can give a decision on the procedural problem which it must answer *in limine litis* and which concerns its own jurisdiction to rule on the case in the main proceedings in place of the Disciplinary Chamber, in the event that the latter does not fulfil the requirements flowing from EU law" (para. 15).

5. OVERVIEW OF THE CJEU'S JURISDICTION OVER NATIONAL JUDICIARY-RELATED MEASURES FIVE YEARS POST *ASJP* JUDGMENT

Five years post *ASJP* judgment, the case law of the Court of Justice has established beyond any doubt that the second subparagraph of Article 19(1) TEU imposes a number of justiciable obligations, including a **general and justiciable obligation on every Member State, not only to guarantee but also to maintain the independence of any national courts and tribunals** which may be called upon to rule on questions relating to the application or interpretation of EU law. To justify the wide scope of application of the second subparagraph of Article 19(1) TEU, the CJEU President, writing extra-judicially, has emphasised that

any undue interference with the independence of national judges triggers a domino effect by undermining mutual trust and the uniform application of Union law and thus **directly threatens the rule of law in the EU as a whole**. Such attacks on the judiciary in one Member State cannot therefore be brushed aside as being “no one else’s business”. On the contrary, due to the essential nature of judicial independence in the EU legal order, they are “everyone’s business”.¹⁶⁶

This Section aims to offer a five-year summary of the national measures and practices examined by the Court of Justice with reference to Article 19(1) TEU before outlining the added value of this provision by comparison to Article 47 CFR when it comes to upholding effective judicial protection. It will end with a brief discussion on whether Article 19(1) TEU may be understood as a boundless provision.

5.1. Overview of national measures and practices examined by the Court of Justice with reference to Article 19(1) TEU

With respect to the five infringement actions lodged by the Commission and alleging a violation of the second subparagraph of Article 19(1) TEU, the Court of Justice has decided three on the merits and always found **it had jurisdiction to review the national legislation in dispute**. The last infringement action launched by the Commission in respect of Poland’s rule of law crisis¹⁶⁷ will provide the Court with an ideal opportunity to confirm it also has jurisdiction to review the (irregular) composition and decisions (plainly violating EU Treaties) of a constitutional court and find inter alia a violation of Article 19(1) TEU due to the combined and deliberate actions of the relevant country’s executive and legislature resulting in this national court no longer being an independent court established by law. Considering the Court’s case-law developed in answer to preliminary ruling requests originating from Romanian courts regarding the obligation to guarantee the independence of constitutional courts in relation, in particular, to the legislature and the executive, as required inter alia by Article 19(1) TEU,¹⁶⁸ one may reasonably predict that the Court will find it has jurisdiction.

Speaking of national requests for a preliminary ruling asking the Court whether the second subparagraph of Article 19(1) TEU must be interpreted **as precluding specific national rules**, including national case-law interpreting these rules, the Court’s case law has grown particularly rich since the

¹⁶⁶ K. Lenaerts, “The Rule of Law and the Constitutional Identity of the European Union”, speech delivered by the president of the CJUE on 17 February 2023 at the conference organized by the Bulgarian Association for European Law in Sofia, published on 5 March 2023: <https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/>.

¹⁶⁷ See Section 3 supra.

¹⁶⁸ Judgment of 21 December 2021 in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion*, EU:C:2022:200.

ASJP judgment in response to **more than fifty requests primarily originating from Polish and Romanian courts**. Five years later, there are many more successful examples of reliance on the second subparagraph of Article 19(1) TEU than the number of examples where the Court held the request for a preliminary inadmissible for lack of jurisdiction. More examples can be found where the Court found specific questions inadmissible on different grounds such as the hypothetical nature of the question submitted to it. However, this is in no way a specific feature of Article 19(1) TEU related preliminary ruling requests.

5.1.1. Infringement cases

To date, within the framework of the infringement procedure, the Court held that it has jurisdiction to review the compatibility with the second subparagraph of Article 19(1) TEU of:

- **National legislation** concerning the lowering of the retirement age of judges of a Supreme Court and granting the President of the country the power to authorise affected judges to continue in active judicial service beyond the new retirement age on a case-by-case basis;¹⁶⁹
- **National legislation** establishing a different retirement age for men and women who are judges or public prosecutors and the lowering of the retirement age of judges of the ordinary courts and public prosecutors while conferring on the Minister for Justice the power to extend the period of active service of those judges;¹⁷⁰
- **National legislation** establishing a disciplinary regime applicable to judges of Supreme Court and to judges of the ordinary courts which, inter alia, established a new disciplinary chamber; allowed the content of judicial decisions adopted by judges of the ordinary courts to be classified as a disciplinary offence; and also allowed 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.¹⁷¹

One may also expect the Court of Justice to find that it has jurisdiction to review the compatibility with the second subparagraph of Article 19(1) TEU of **Poland's "muzzle law"** which, inter alia, amended previous rules on the organisation of ordinary courts and Supreme Court and limits or excludes the possibility for a national court to ensure that individuals claiming rights under EU law have access to an independent and impartial tribunal previously established by law.¹⁷²

Considering the case-law to date, the Court of Justice may also be expected to conclude it has jurisdiction in light of the second subparagraph of Article 19(1) TEU to review not merely legislative measures but also **the irregular composition of a constitutional court, its lack of independence as well its decisions** which, inter alia, denied the binding effect of any interim measures of the Court of Justice issued under Article 279 TFEU to guarantee the effective judicial review by an independent and impartial tribunal established by law.¹⁷³

¹⁶⁹ Judgment of 24 June 2019 in Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531.

¹⁷⁰ Judgment of 5 November 2019 in Case C-192/18, *Commission v Poland (Independence of ordinary courts)*, EU:C:2019:924.

¹⁷¹ Judgment of 15 July 2021 in Case C-791/19, *Commission v Poland (Disciplinary Regime of Judges)*, EU:C:2021:596.

¹⁷² Forthcoming judgement in Case C-204/21, *Commission v Poland (Independence and private life of judges)*.

¹⁷³ Forthcoming judgment in *Commission v Poland* in respect of Poland's (irregularly composed and presided) Constitutional Tribunal.

5.1.2. Preliminary ruling cases

To date, within the framework of the preliminary ruling procedure, the Court held that it had jurisdiction to interpret the second subparagraph of Article 19(1) TEU and answer questions submitted to it by national courts relating to:

- **National proceedings** between a judge of Poland's Supreme Administrative Court and Poland's National Council of the Judiciary concerning the judge's early retirement due to the entry into force of new legislation;¹⁷⁴
- **National proceedings** between two judges of Poland's Supreme Court and the Supreme Court concerning their early retirement due to the entry into force of new legislation;¹⁷⁵
- **National proceedings** between several Polish judges and the Poland's National Council of the Judiciary concerning resolutions by which the latter decided not to propose to the President of the Republic the appointment of the persons concerned to positions as judges at the Supreme Court and to propose the appointment of other candidates to those positions;¹⁷⁶
- **National proceedings** between a Maltese association dedicated to the protection of the rule of law and Malta's Prime Minister concerning, inter alia, the conformity with EU law of the provisions of the Constitution of Malta governing the procedure for the appointment of members of the judiciary;¹⁷⁷
- **National proceedings** between a Romanian association of judges and the national Judicial Inspectorate concerning the latter's refusal to provide information of public interest relating to its activity;¹⁷⁸
- **National proceedings** between two Romanian associations (one consisting of judges and the other one consisting of prosecutors) and the national Supreme Council of the Judiciary concerning the legality of two decisions approving regulations on the appointment and removal of prosecutors performing managerial or executive roles in the Section within the Public Prosecutor's Office for the investigation of offences committed within the judicial system;¹⁷⁹
- **National complaint** by a private individual against a judge concerning alleged abuse of office committed by this judge;¹⁸⁰
- **National complaint** brought by a private individual against several prosecutors and judges concerning alleged abuse of office and membership of a criminal organisation;¹⁸¹
- **National proceedings** between Romanian associations of judges and of prosecutors and the prosecutor's office attached to the High Court of Cassation and Justice concerning the legality of an order of the Prosecutor General of Romania relating to the organisation and operation of the SIJ;¹⁸²

¹⁷⁴ See Case C-585/18 in the Court's Judgment of 19 November 2019 in Joined Cases C-585/18, C-624/18 et C-625/18, *A. K. e.a. (Independence of the disciplinary chamber of the Supreme Court)*, EU:C:2019:982.

¹⁷⁵ See Cases C-624/18 et C-625/18, *ibid.*

¹⁷⁶ Judgment of 2 March 2021 in Case C-824/18, *A.B. et al (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153.

¹⁷⁷ Judgment of 20 April 2021 in Case C-896/19, *Repubblika v Il-Prim Ministru*, EU:C:2021:31.

¹⁷⁸ See Case C-83/19 in the Court's Judgment 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, *Asociația 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393.

¹⁷⁹ See Case C-127/19, *ibid.*

¹⁸⁰ See Case C-195/19, *ibid.*

¹⁸¹ See Case C-291/19, *ibid.*

¹⁸² See Case C-355/19, *ibid.*

- **National proceedings** between a private individual and Romania's Ministry of Public Finances concerning a claim for compensation for material and non-material damage resulting from an alleged judicial error;¹⁸³
- **National appeal** brought by a Polish judge before the Supreme Court accompanied by an application for the recusal of all judges sitting in the Chamber of Extraordinary Control and Public Affairs which is to examine that appeal follow the rejection by the National Council of the Judiciary of his challenge against the decision ordering his forced transfer;¹⁸⁴
- **National (criminal) proceedings** brought against several private individuals and pending before adjudicating panels of a Regional Court which include judges seconded in accordance with a decision of the Minister for Justice pursuant the Law on the organisation of the ordinary courts;¹⁸⁵
- **National (criminal) proceedings** against several private individuals for offences inter alia of corruption and of tax fraud related to value added tax;¹⁸⁶
- **National proceedings** between a Romanian Court of Appeal judge, supported by a Romanian association of judges, and Romania's Judicial Inspection, Superior Council of Magistracy, the High Court of Cassation and Justice concerning the imposition of a disciplinary penalty on this judge.¹⁸⁷
- **National proceedings** brought by a private individual who was the subject of criminal proceedings in Romania, at the end of which he was convicted, seeking to challenge the duration of criminal proceedings instituted in response to a complaint lodged by his wife against a prosecutor and two judges involved in these proceedings;¹⁸⁸
- **National proceedings** between consumers and a Polish bank concerning the alleged unfairness of a term in a loan agreement concluded by these consumers with that bank.¹⁸⁹

The examples above show that questions regarding the interpretation of the second subparagraph of Article 19(1) TEU have been asked by referring courts **in an increasingly diverse set of national disputes although, for the time being, most of these national proceedings have directly involved judges or associations dedicated to the defence of the rule of law as applicants.** In fewer instances, a number of requests (from Romanian courts) originate from private complaints regarding judges or prosecutors on account of their judicial activities. Finally, an increasing number of requests (from Polish courts) originate from regularly appointed judges with concerns regarding the legal consequences of the presence of individuals irregularly appointed on the adjudicating panels on which the regularly appointed judges sit.

In providing the Court of Justice with the opportunity to interpret the second subparagraph of Article 19(1) TEU in a variety of national contexts, **national referring courts have enabled the Court to**

¹⁸³ See Case C-397/19, *ibid.*

¹⁸⁴ Judgment of 6 October 2021 in Case C-487/19, *W.Ż.* (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), EU:C:2021:798.

¹⁸⁵ Judgment of 16 November 2021 in Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others*, EU:C:2021:931.

¹⁸⁶ See Cases C-357/19, C-379/19, C-811/19 and C-840/19 in the Court's Judgment of 21 December 2021 in Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, EU:C:2022:200.

¹⁸⁷ See C-547/19, *ibid.*

¹⁸⁸ Judgment of 22 February 2022 (Grand Chamber) in Case C-430/21, *RS (Effects of a constitutional court rulings)*, EU:C:2022:99.

¹⁸⁹ Judgment of 29 March 2022 (Grand Chamber) in Case C-132/20, *Getin Noble Bank*, EU:C:2022:235.

clarity the types of national measures which they may, in turn, find incompatible with the EU principle of effective judicial protection. Before offering a non-exhaustive summary of the main types of measures examined by the Court when answering preliminary ruling questions, one may helpfully recall that 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 also enshrined in Article 47 CFR post Lisbon Treaty, with the second subparagraph of Article 19(1) TEU requiring 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:

- Both Article 47 CFR and the second subparagraph of Article 19(1) TEU **preclude legislative rules** which confer exclusive jurisdiction on a court which is not an independent and impartial court regarding cases concerning the application of EU law and it is for the referring court to ascertain whether Poland's Disciplinary Chamber meets these requirements;
- The second subparagraph of Article 19(1) TEU **precludes legislative amendments** such as the amendments to the Polish Law on the National Council of the Judiciary which have the effect of removing effective judicial review of that council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court where it is apparent – which is for the referring court to assess – those amendments are capable of giving 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 National Council of the Judiciary resolution to external factors, and as to their neutrality with respect to the interests before them;
- The second subparagraph of Article 19(1) TEU may be applied in a case in which a national court is seised of an action provided for by national law and seeking a ruling on the conformity with EU law of national provisions governing the procedure for the appointment of members of the judiciary of the Member State to which that court belongs and must be interpreted as (i) **precluding national provisions** relating to the organisation of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence; and (ii) **not precluding national provisions** which confer on a Prime Minister a decisive power in the process for appointing members of the judiciary, **while providing for the involvement, in that process, of an independent body** responsible for, inter alia, assessing candidates for judicial office and giving an opinion to that Prime Minister;
- The second subparagraph of Article 19(1) TEU, in conjunction with Article 2 TEU and Decision 2006/928, must be interpreted as **precluding national legislation** which (i) allows a government to make interim appointments to the management positions of the judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors in a situation where this legislation make it possible for this body to be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors; (ii) provides for the creation of a specialised section of the Public Prosecutor's Office with exclusive competence to conduct investigations into offences committed by judges and prosecutors in the absence of any objective justifications and specific guarantees preventing it from being used as an instrument of political control over the activity of those judges and prosecutors; (iii) provides that a finding of judicial error, made in proceedings to establish the State's financial liability and without the judge concerned having been heard, is binding in the subsequent proceedings relating to an action for indemnity to establish the personal liability of that judge, and where that legislation does not, in general,

provide the necessary guarantees to prevent such an action for indemnity being used as an instrument of pressure on judicial activity and to ensure that the rights of defence of the judge concerned are respected; and (iv) prohibits national ordinary courts to disapply of their own motion a national provision falling within the scope of Decision 2006/928, which they consider, in the light of a judgment of the Court of Justice, to be contrary to that decision or to the second subparagraph of Article 19(1) TEU;

- The second subparagraph of Article 19(1) TEU and the principle of primacy of EU law must be interpreted as meaning that a national court seised of an application for recusal as an adjunct to an action by which a judge holding office in a court that may be called upon to interpret and apply EU law challenges a decision to transfer him without his consent, must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law – **declare null and void a last instance court order issued by an individual whose appointment took place in clear breach of fundamental rules governing the judicial system concerned** and the integrity of the outcome of that appointment procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned, with the result that that order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU;
- The second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU and Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, must be interpreted as **precluding national legislation** pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, send a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period;
- The second subparagraph of Article 19(1) TEU, in conjunction with Article 2 TEU and Decision 2006/928, must be interpreted as (i) **precluding national rules** under which any failure to comply with the decisions of the national constitutional court by national judges of the ordinary courts can trigger their disciplinary liability and (ii) **not precluding national rules or a national practice** under which the decisions of the national constitutional court are binding on the ordinary courts, **provided that the national law guarantees the independence of that constitutional court** in relation, in particular, to the legislature and the executive, as required by those provisions;
- The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as **precluding national rules or a national practice** under which (i) the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law and/or (ii) a national judge may incur disciplinary liability on the ground that he/she has applied EU law, as interpreted by the Court of Justice, thereby departing from case-law of the constitutional court of the Member State concerned;
- The second subparagraph of Article 19(1) TEU and Article 47 CFR must be interpreted as (i) meaning that the circumstance that a judge's initial appointment in a Member State to such a

position or subsequent appointment to a higher court resulted from a decision adopted by a body of an undemocratic regime in place in that Member State prior to its accession to the EU, is not capable per se of giving rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge or, consequently, of calling into question the status as an independent and impartial tribunal previously established by law of a court formation which includes that judge and (ii) **not precluding** the formation of a court of a Member State which includes a judge whose initial appointment as a judge or subsequent appointment to a higher court was made either following that judge's selection as a candidate for a judicial position by a body composed on the basis of legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State or following that judge's selection as a candidate for a judicial position by a body properly composed but following a procedure that was neither transparent nor public nor open to challenge before the courts, **provided that such irregularities are not 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 serious and legitimate doubts, in the minds of individuals, as to the independence and impartiality of the judge concerned, from being considered to be an independent and impartial tribunal previously established by law.

5.2. Overview of the added value of Article 19(1) TEU by comparison to Article 47 CFR

In the *Maltese judges* ruling, the Court of Justice helpfully clarified the different yet complementary scope of application of both provisions as follows:

Thus, while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law.¹⁹⁰

To put differently, **while Article 47 CFR can be relied upon by individuals in national cases falling within the scope of EU law, the second subparagraph of Article 19(1) TEU has “a transversal character and apply whenever a jurisdiction may be required to rule upon cases ‘in fields covered by Union law’”**.¹⁹¹ In other words, to quote the CJEU President, the second subparagraph of Article 19(1) TEU “is not limited to protecting the rights that EU law confers on individuals” but also “protects the independence of Member State courts at all times. That is because only such permanent protection may prevent the entire edifice of EU judicial remedies from collapsing.”¹⁹²

Prior to the Court's ASJP judgment, the Commission declined to enforce compliance with the principle of effective judicial protection on the basis of second subparagraph of Article 19(1) TEU. Considering the more limited and individual scope of Article 47 CFR, **the Commission's restrictive enforcement approach allowed systemic and irreparable violations of the EU requirements relating to effective judicial protection to go largely unsanctioned.**

¹⁹⁰ Case C-896/19, *Repubblica*, EU:C:2021:31, para. 52.

¹⁹¹ Opinion of AG Collins delivered on 15 December 2022 in Joined C-181/21 and C-269/21, *G. and Others (Appointment of judges to the ordinary courts in Poland)*, EU:C:2022:990, para. 34.

¹⁹² K. Lenaerts, “The Rule of Law and the Constitutional Identity of the European Union”, op. cit.

To illustrate this point, one may briefly compare how the Commission reacted to two attempts – one successful and another one unsuccessful – to capture the senior echelons of one's national judiciary in breach of EU requirements relating to effective judicial protection via a retroactive lowering of the retirement age of judges.

Faced with the retroactive lowering of the retirement age of Hungarian judges in 2011 which meant that judges who reasonably expected to continue working until the age of 70 were abruptly forced to retire at the age of 62 with immediate effect. This resulted in the removal and replacement of about 8% of the all 2,900 judges, 27% of Supreme Court judges and more than 50 % of appeal court presidents.¹⁹³

As the Commission failed to apply for interim measures, Hungarian authorities were left with ample time to fill nearly all of positions made unlawfully available. And **while the Commission did launch a successful infringement action, it did not do so on the basis of Article 19(1) TEU but on the basis of Council Directive 2000/78/EC** establishing a general framework for equal treatment in employment and occupation.¹⁹⁴ Furthermore, the Commission accepted that the forcibly retired Hungarian judges could be offered compensation in lieu of prompt reinstatement to their previous posts. Adding insult to injury, the Commission celebrated the closure of this infringement procedure on 20 November 2013 on the back of what may be viewed as a completely Pyrrhic victory.¹⁹⁵ Indeed, while the "Commission's conventional infringement action had been successful in legal terms", "it changed absolutely nothing in the troubling situation on the ground."¹⁹⁶ In addition, **the Commission did not legally react to the measures specifically adopted to remove certain judges such as Mr András Baka who was then the President of the Hungarian Supreme Court**, forcing Mr Baka to lodge a complaint with the ECtHR.¹⁹⁷ One may note that notwithstanding the ECtHR judgment finding against Hungary in 2014, Hungarian authorities have deliberately continued to violate this judgment to this day¹⁹⁸ with the European Commission only regularly expressing concerns in this respect and yet to launch a single infringement action based on Article 19(1) TEU to date.

By contrast, **by applying for interim measures** in October 2018 – a few months after the entry into force of the challenged Polish legislation in April 2018 – and requesting the Court of Justice **to provisionally restore Poland's Supreme Court to its situation before the date of the entry into force of the challenged legislation** and relying on Article 19(1) TEU, the Commission was able to obtain from the Court of Justice an order and a judgment which prevented a purge of the Supreme Court to borrow the language used by the then First President of the Supreme Court.¹⁹⁹ This was

¹⁹³ See P. Bárd and L. Pech, "How to build and consolidate a partly free pseudo democracy by constitutional means in three steps", RECONNECT Working Paper no. 4, October 2019, p. 18.

¹⁹⁴ Judgment of 6 November 2012 in Case C-286/12, Commission v Hungary, EU:C:2012:687.

¹⁹⁵ See Press Release of the European Commission, IP/13/1112.

¹⁹⁶ K.L. Scheppele et al, "EU Values Are Law, after All", op. cit., p. 42.

¹⁹⁷ See ECtHR judgment of 27 May 2014 in *Baka v Hungary*, application no. 20261/12 (the ECtHR found against Hungary on Articles 6(1) and 10 ECHR grounds but the damage was done and the Supreme Court fully captured by the ruling party by then).

¹⁹⁸ See recently, Hungarian Helsinki Committee, "New submissions to the Committee of Ministers in the Baka v. Hungary case", 24 February 2022: <https://helsinki.hu/en/new-submissions-to-the-committee-of-ministers-in-the-baka-v-hungary-case/> ("the Hungarian authorities simply refuse to implement the judgment, and have failed to take any measures at all to implement previous recommendations by the Committee of Ministers"); Hungarian Helsinki Committee, "The non-execution of the Baka judgment is becoming all the more embarrassing for Hungary", 21 March 2023: <https://helsinki.hu/en/the-non-execution-of-the-baka-judgment-is-becoming-all-the-more-embarrassing-for-hungary/> ("the Hungarian state continues to ignore the committee's expectations")

¹⁹⁹ Judge Gersdorf described the relevant Polish legislation as amounting to "a purge of the supreme court, conducted under the guise of retirement reform", quoted by C. Davies, "Head of Polish supreme court defies ruling party's retirement law", *The Guardian*, 4 July 2018.

however a short-lived legal victory as the Commission has since failed to challenge the multiple and grossly irregular appointments made to the Supreme Court via the new National Council for the Judiciary as unconstitutionally reconstituted by a 2017 amending act.²⁰⁰ In other words, while Poland's ruling coalition was not able to swiftly capture Poland's Supreme Court, they were able to do so at a slower pace via multiple irregular appointments with every single chamber of Poland's Supreme Court now unlawfully composed in addition to being presided by one of these irregularly appointed individuals.

Due to the Commission's failure on this front, **the European Court of Human Rights has been seized of a growing – and unprecedented for an EU Member State – number of complaints** relating mostly to the systemic dysfunction in Poland's judicial appointment procedure due to the involvement of the post 2017 unconstitutionally reconstituted National Council of the Judiciary. As of 16 February 2023, **there are 323 applications pending** before the Strasbourg Court which raise issues relating to Poland's rule of law crisis with more to be expected as these applications mostly relate to changes made to the organisation of Poland's judiciary under laws that mainly entered into force in 2017 and 2018. **More than 100 of these applications** have been communicated to the Polish government with the European Court of Human Rights having decided a total of 10 applications on the merits to date. In addition, the Court has received a **total of 60 requests for interim measures** from Polish judges in 29 cases concerning the disciplinary and waiving of judicial immunity cases against them and granted these requests in 17 cases.²⁰¹

²⁰⁰ For further details, see L. Pech and J. Jaraczewski, "Systemic Threat to the Rule of Law in Poland", op. cit.

²⁰¹ See ECtHR, "Non-compliance with interim measure in Polish judiciary cases", Press release, ECHR 053 (2023), 16 February 2023.

Table 1: Challenging national law lowering the retirement age of sitting judges: A comparison of the Commission's approach in Case C-286/12 v Cases C-691/18 and C-192/18

	Case C-286/12, <i>Commission v Hungary</i>	Case C-619/18, <i>Commission v Poland</i>	Case C-192/18, <i>Commission v Poland</i>
Subject-matter	National legislative provisions lowering the age-limit for compulsory retirement of judges, prosecutors and notaries	National legislative provisions lowering the retirement age of Supreme Court judges and applying it to judges appointed to the Supreme Court before the entry force of these provisions	National legislative provisions lowering the retirement age of ordinary court judges and introducing a distinction between the retirement age for men and women working as ordinary judges, Supreme Court judges, and prosecutors
Commission's pleas in law	<p>Hungary has failed to fulfil its obligations under Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation as the national scheme requiring the compulsory retirement of judges, prosecutors and notaries on reaching the age of 62</p> <p>(i) gives rise to a difference in treatment on grounds of age;</p> <p>(ii) this difference in treatment on grounds of age is not justified by legitimate objectives and</p> <p>(iii) is not, in any event, appropriate or necessary as regards the objectives pursued</p>	<p>Poland has failed to fulfil its obligation under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 CFR as</p> <p>(i) the lowering the retirement age of judges currently in office, appointed to the Supreme Court before the date of entry into force of the law, infringes the principle of security of tenure of judges</p> <p>and</p> <p>(ii) the granting the President of the Republic of Poland discretion to extend the active mandate of Supreme Court judges infringes the principle of judicial independence</p>	<p>Poland has also failed its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 CFR as the lowering of the retirement age and simultaneous granting to the Minister for Justice of the right to decide whether to extend the period of active service of judges violates requirements relating to effective judicial protection;</p> <p>Poland has also failed to fulfil its obligations under Article 157 TFEU and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) by establishing a different retirement age for men and women as this amounts to discrimination based</p>

			on sex prohibited by EU law
Court's ruling	By adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC	By providing that the measure consisting in lowering the retirement age of the judges of the Supreme Court is to apply to judges in post who were 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, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU	By establishing a different retirement age for men and women who are ordinary court or Supreme Court judges, or are public prosecutors, Poland has failed to fulfil its obligations under Article 157 TFEU and Directive 2006/54/EC; And by granting the Minister for Justice the right to decide whether or not to authorise ordinary court judges to continue to carry out their duties beyond the new retirement age of those judges, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU

Source: Author based on the ECJ's judgments in Case C-286/12, Case C-691/18 and Case C-192/18

To furthermore help readers quickly grasp the key common and distinguishing features of the individual right to effective judicial protection guaranteed under Article 47 CFR and the principle of effective judicial protection guaranteed under the second subparagraph of Article 19(1) TEU, the table below will **summarise the situation five years post the ASJP judgment**. As previously outlined, in this judgment, the Court confirmed that the second subparagraph of Article 19(1) TEU may be used as a self-standing ground for the review of the compatibility of national measures with the principle of effective judicial protection.

Table 2: Common and distinguishing features of Article 47 CFR compared to Article 19(1) TEU

	Article 47 CFR	Article 19(1) TEU
Common feature (I): Same content	Provision constitutes a reaffirmation of the principle of effective judicial protection – a general principle of EU law – and enshrines the right to an effective remedy and the right to an	Provision also refers to the principle of effective judicial protection and has same content as regards the guarantees and requirements relating to judicial independence, impartiality, and previously

	independent and impartial tribunal previously established by law, as regards the protection of the rights and freedoms guaranteed by EU law	established by law, as Article 47 CFR must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU
Common feature (II): Direct effect	Article 47 CFR is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such, in particular in so far as that provision requires that national courts called upon to interpret and apply EU law to satisfy the requirement of independence laid down by that provision	The second subparagraph of Article 19(1) TEU is also directly effective as it imposes on the Member States a clear and precise obligation as to the result to be achieved, with this obligation not subject to any condition as regards, in particular, the independence which must characterise the courts called upon to interpret and apply EU law
Distinguishing feature (I): Primary purpose	Individual dimension: Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he/she derives from EU law	General dimension: The second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies and procedures established by each Member State guarantees effective judicial protection in the fields covered by EU law and imposes a general obligation to ensure that national courts which come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection
Distinguishing feature (II): Material scope of application	Applicable only where the Member States implement EU law/act within the scope of EU law <i>and</i> presupposes that the person invoking Article 47 CFR is relying on right(s) or freedom(s) guaranteed by EU law. If conditions not met, Article 47 CFR is not applicable	Applicable irrespective of whether the Member States are implementing EU law as this provision relates to "fields covered by Union law", which covers all national courts that may be called upon to rule on questions concerning the application or interpretation of EU law

Source: Author based on the CJEU's case law to date

5.3. Article 19(1) TEU: A boundless provision?

While the outer limits of the scope of Article 19(1) TEU continues to be debated, **the idea of limiting the application of the second subparagraph of Article 19 (1) TEU "to structural breaches, in combination with the essence of the right to effective judicial protection, has neither been endorsed nor dismissed by the Court"**.²⁰² The Court has however considered the systemic nature or

²⁰² S. Prechal, "Article 19 TEU and national courts: A new role for the principle of effective judicial protection?", REALaw.blog, 29 November 2022: <https://realaw.blog/2022/11/29/article-19-teu-and-national-courts-a-new-role-for-the-principle-of->

impact of the relevant national measures or practices when it has been provided with an opportunity to assess them and decide whether these national measures or practices are compatible with EU law (infringement cases), or clarify whether Article 19(1) TEU must be interpreted as precluding them (preliminary cases).

This does not mean that the scope of Article 19(1) TEU is boundless. To borrow from Judge Sacha Prechal, this provision may be understood as “an institutional provision”²⁰³ primarily concerned with guaranteeing that all national courts meet the requirements of effective judicial protection considering their role in the EU legal order and whose main added value is to trigger the application of these requirements in respect of any national court which may be called upon to interpret and apply EU law.

In examining the compatibility of national measures or practices relating, for instance, to the judicial appointments, the removal of judges from office, their retirement age, the disciplinary regime applicable to them or the secondment or transfer of judges with effective judicial protection requirements under Article 19(1) TEU, **“the Court of Justice does not seek to redesign national judiciaries**, as that remains an exclusive competence of the Member States. Rather, the Court of Justice limits itself to examining whether rules that concern the organization and functioning of national courts”²⁰⁴ comply with fundamental principles of EU law which are themselves enshrined in ECHR law and in the national law of each of the EU Member States such as the principle of judicial independence. To put it differently, **While EU law “does not impose any particular model on the judicial systems of the Member States, it does lay down red lines”**²⁰⁵ to the extent that Member States must always comply with their obligations deriving from EU law, in particular the principle of effective judicial protection, even when they exercise their exclusive competence as regards the organisation of the national judiciary.

Fundamental principles such as judicial independence not only constitute one of the core components of the rule of law, a value which “forms part of the very foundations of the European Union and its legal order”,²⁰⁶ they also amount to **EU principles containing legally binding obligations which Member States freely and voluntarily committed themselves to respect prior to their EU accession.** Indeed, as recalled by the Court of Justice in a context characterised by increasing rule of law backsliding and open disregard of European but also national rulings,²⁰⁷ not only is respect for EU values such as the rule of law, “a prerequisite for the accession to the European Union”,²⁰⁸ compliance by a Member State with the values contained in Article 2 TEU is also “a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State”.²⁰⁹

The EU and its legal order would cease to exist if compliance with Article 2 TEU values such as the rule of law – a value which is given concrete expression in Article 19(1) TEU – could be reduced to obligation

[effective-judicial-protection-by-s-prechal/](#). For a more comprehensive analysis, see from the same author, “Effective judicial protection: some recent developments – moving to the essence” (2020) 13 *REALaw* 175.

²⁰³ “Article 19 TEU and national courts”, *ibid*.

²⁰⁴ K. Lenaerts, “New Horizons for the Rule of Law Within the EU” (2020) 21 *German Law Journal* 29, p. 33.

²⁰⁵ K. Lenaerts, ‘Constitutional relationships between legal orders and courts within the European Union’, FIDE 2021, XXIX FIDE Congress, 4 November 2021: https://fide2020.eu/wp-content/uploads/2021/11/FIDE-Opening-Ceremony_-4-November-2021_Koen-Lenaerts.pdf.

²⁰⁶ Case C-156/21, para. 128 and C-157/21, para. 146.

²⁰⁷ See e.g. European Parliament resolution of 19 May 2022 on the Commission’s 2021 Rule of Law Report, PA_TA(2022)0212, para. 55: “Is concerned by the persistent failure by some Member States, including Hungary and Poland, to implement domestic, CJEU and ECtHR judgements, which contributes to the erosion of the rule of law”.

²⁰⁸ Case C-156/21, para. 124 and C-157/21, para. 142.

²⁰⁹ Case C-156/21, para. 126 and C-157/21, para. 144.

which a candidate State must meet in order to accede to the EU but could disregard its accession. Viewed in this light, **the Court of Justice's interpretation of the second subparagraph of Article 19(1) TEU** as a provision with "a transversal character" which applies "whenever a jurisdiction may be required to rule upon cases 'in fields covered by Union law'"²¹⁰ **may be viewed as compelling if not imperative.**

²¹⁰ Opinion of AG Collins delivered on 15 December 2022 in Joined C-181/21 and C-269/21, *G. and Others (Appointment of judges to the ordinary courts in Poland)*, EU:C:2022:990, para. 34.

6. POLICY RECOMMENDATIONS

As requested by the LIBE and AFCE committees, the present author in collaboration with Professor Petra Bárd published an exhaustive study in February 2022 focusing on the EU's rule of law toolbox and in particular, the Commission's annual rule of law report (ARoLR).²¹¹ To remain as concise as possible, this study will merely recall the most important recommendations made a year ago and critically highlight the most important change introduced by the Commission at the time of the publication of the third edition of the ARoLR last July, that is, the inclusion of country specific recommendations. The increasingly prevalent issue of non-compliance with CJEU and ECtHR rulings will then be specifically addressed.

6.1. Main recommendations regarding the EU's rule of law toolbox with a special focus on the ARoLR

Among the most important general recommendations made in the study requested by the LIBE and AFCE committees last year, one may mention the following as the problems they relate to remain unaddressed:

- **Actors involved in the ARoLR:** The involvement of an expert panel/network of external experts and/or the EU Fundamental Rights Agency should be considered if only at first to merely provide feedback to the Commission and help inter alia with methodological issues and avoid any potential omission, inadvertent or otherwise, of relevant key legal developments;
- **Material scope of the ARoLR:** As long as the ARoLR is not extended to cover other foundational values enshrined in Article 2 TEU, the Commission should at a minimum better link the ARoLR with the values of democracy and fundamental rights and connected EU action plans and other strategies, considering the interconnected and mutual reinforcing nature of Article 2 TEU values. Scrutiny over **judicial independence** for example could extend to the evaluation of national developments relating to fair trial rights, access to justice and equality before the law;
- **Temporal scope of the ARoLR:** The ARoLR ought to assess in more depth and in a more holistic way the evolution of the situation in EU Member States, especially in respect of the countries which are undergoing Article 7(1) TEU proceedings, and do so over more than a mere period of 12 months so as to make clearer EU countries' rule of law adherence over a sufficient long period of time and highlight cross-cutting trends at EU level. This could be done inter alia by taking into account and summarise key data and findings from relevant indices such as the Worldwide Governance Indicators (WGI) project, the World Justice Project Rule of Law Index, or the Varieties of Democracy (V-Dem) project;
- **New Article 7 TEU section:** The insertion of a new Article 7 TEU state of play section in the umbrella report should be included so as to better highlight in a transversal way the evolution of the situation in the countries which have already been identified as being on an autocratisation pattern following the activation of one of the procedures laid down in Article 7 TEU;

²¹¹ L. Pech and P. Bárd, *The European Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU values*, PE 727.551, February 2022.

- **New EU chapter:** In addition to the country chapters, the ARoLR should include a new EU chapter with the drafting of this report to be done either by the EU Fundamental Rights Agency and/or a new panel or network of academic experts to avoid a self-assessment report;
- **Country specific recommendations (CSRs):** Specific and actionable CSRs to be included with automatic legal and/or financial actions to follow when CSRs are not fully addressed within a specific timeframe, with a mid-year assessment of the state of (non)compliance to be organised and the Commission to be requested to specify how identified instances of non-compliance will be dealt with at this intermediary stage;
- **Non-compliance with European and national rulings:** Data and information regarding non-compliance (or bad faith implementation) with CJEU orders and judgments but also national and ECtHR orders and rulings which concern any issue relating to any of the ARoLR's pillars must be included (more details below in Section 6.2);
- **Better follow up:** The ARoLR (including CSRs) should be more directly aligned with other rule of law tools and procedures, such as Article 7 TEU; the infringement procedure and the Rule of Law Conditionality Regulation 2020/2092, so that remedial action could be more swiftly, consistently and effectively organised in situations where national authorities ignore or violate relevant CSRs;
- **More clarity, less euphemism:** As outlined by the Parliament itself, the Commission should avoid "presenting breaches of a different nature equally", which "risks trivialising the most serious breaches of the rule of law" and seek instead "to differentiate its reporting by distinguishing between systemic breaches of the rule of law and individual, isolated breaches".²¹² In other words, the Commission should state "whether there were serious deficiencies, a risk of a serious breach or an actual breach of EU values in each of the pillars analysed in the country chapters".²¹³
- **More enforcement, less dialogue:** Dialogue-based mechanisms do not work in situations where national authorities deliberately seek to implement an autocratisation blueprint and enforcement must not be considered as a last resort response. As Guardian of the Treaties, it is first and foremost up to the Commission to promptly, consistently and forcefully enforce Article 2 TEU values when these values are deliberately, persistently and systematically violated by relying, simultaneously, on all relevant instruments available to it.

To a very large extent, the recommendations made above have not been followed up. **The key change last year was the inclusion of country specific recommendations (CSRs) as part of the ARoLR but these recommendations follow the (failed) model of the European Semester CSRs.** In other words, they remain expressed in broad terms in most instances and inaction by relevant Member States can be at best recorded in the next edition of the ARoLR. One may therefore expect the ARoLR CSRs to know the fate of European Semester CSRs, with the EU losing credibility with every new iteration of the same CSR in the absence of follow up enforcement action to address inaction, including in situations where EU law is manifestly violated.

²¹² Resolution of 24 June 2021 on the Commission's 2020 Rule of Law, P9_TA(2021)0313, *op. cit.*, para. 4.

²¹³ *Ibid.*

This criticism of the ARoLR's CSR appears to be widely shared and one may cite, in this respect, the joint statement on the Commission's 2023 Rule of Law Report signed by more than thirty civil society groups and which suggests inter alia **to increase the specificity and qualitative assessment of the CRS:**

The lack of specificity regarding the nature of the recommendations, particularly whether or not they are binding, hinders effective implementation. If the Commission wants the recommendations to feed directly into enforcement procedures such as the Article 7 procedure, the conditionality mechanism, or infringement proceedings, it needs to be more specific about the nature of the recommendations and ensure that these are sufficiently clear, concrete and measurable to address the specific issues identified in the report. A clear link should be established between these mechanisms and the review cycle, whose recommendations should be made directly enforceable. In addition, a system for qualitatively assessing the implementation of the recommendations should be introduced.²¹⁴

The same joint statement also recommends to a more systemic answer when the judgments and orders of the ECJ and/or ECtHR are not complied with, an issue which will be addressed in more details below.

6.2. Specific recommendations regarding the issue of increasing non-compliance with CJEU rulings

With a view of leading to prompter and stronger enforcement, the Parliament rightly recommended in 2021 **the inclusion of "detailed data on Member States' compliance with CJEU rulings"**²¹⁵ so as to better highlight cases where CJEU rulings are not complied with the view of more easily identifying situations where the Commission is not fulfilling its duties as Guardian of the Treaties by providing immediate and adequate legal responses, in particular on the basis of Article 260 TFEU.

In addition, and again positively considering Article 6(2) TEU (EU accession to the ECHR), Article 6(3) TEU (Fundamental rights as guaranteed inter alia by the ECHR shall constitute general principles of EU law) and Article 52(3) CFR (meaning and scope of CFR rights corresponding to ECHR rights must be the same), the Parliament recommended **the inclusion of detailed data on Member States' "non-compliance with judgments of the European Court of Human Rights"**.²¹⁶ Most recently, the Parliament also suggested to summarise the "views of the UN Treaty Bodies concerning individual communications".²¹⁷

Building on the Parliament's recommendations, the study published last February by Professor Petra Bárd and the present author further recommended that the ARoLR includes **"data and information regarding non-compliance (or bad faith implementation) with CJEU orders and judgments but also national and ECtHR orders and rulings which concern any issue relating to any of the ARoLR's pillars"** in order to better identify threats and violations of the rule of law and make non-compliance with court judgments a recurrent, more salient and costly issue for relevant national authorities".²¹⁸ In addition, **closer monitoring of rulings of (captured) national courts, especially those of last resort, was also recommended** "so as to facilitate the initiation of infringement

²¹⁴ Joint statement dated 22 February 2023 is available at: <https://epd.eu/2023/02/22/joint-statement-on-the-european-commissions-2023-rule-of-law-report/>.

²¹⁵ Resolution of 24 June 2021 on the Commission's 2020 Rule of Law, P9_TA(2021)0313, para. 16.

²¹⁶ Ibid., para. 48.

²¹⁷ See European Parliament resolution of 19 May 2022 on the Commission's 2021 Rule of Law Report, PA_TA(2022)0212, para. 15.

²¹⁸ L. Pech and P. Bárd, *The European Commission's Rule of Law Report*, op. cit., p. 14.

proceedings under Article 258 TFEU against national authorities hiding behind (captured) national courts to consistently breach the principle of primary of EU law.”²¹⁹

The **key idea underlying the recommendations above is to make it more difficult for the Commission and the Council to merely express their “concerns” – if at all – when faced with the systemic disregard of national and/or European rulings in a Member State**, in particular when they concern national checks and balances as well as the rule of law which, as the Court of Justice, recalled last year, is “a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order”.²²⁰ In this respect, one must unfortunately report that the Commission has “arguably **failed to react appropriately to non-compliance with ECJ judgments** in a similar way than the Commission has arguably failed to launch infringement actions when faced with systemic attacks on judicial independence”.²²¹

This problem has not gone away – and is indeed arguably worse than ever – as recognised by the Parliament in its resolution of 19 May 2022 on the Commission’s 2022 Rule of Law Report:

Is concerned by the persistent failure by some Members States, including Hungary and Poland, to implement domestic, CJEU and ECtHR judgements, which contributes to the erosion of the rule of law; stresses that the non-implementation of judgments can lead to human rights violations being left without remedy; highlights that this may create a perception in the public that judgments can be disregarded, undermining the independence of the judiciary and general trust in the force of fair adjudication; calls on the Commission to continue reporting on the respective country chapters about the implementation of judgments by Member States in cases of partial or lack of implementation; encourages the Commission to engage with authorities in order to find suitable solutions for complete implementation and to update the information on an annual basis; recalls that the failure to implement the CJEU’s Coman & Hamilton judgment¹ resulted in the plaintiffs having to resort to the ECtHR for redress.²²²

Last year, for the first time, non-compliance data with ECtHR judgments was positively (but not always consistently) included in the Commission’s ARoLR:

The track record of implementing leading judgments of the European Court of Human Rights (ECtHR) is also an important indicator for the functioning of the rule of law in a country. The country chapters therefore for the first time include systematic indicators on the implementation of ECtHR leading judgments by all Member States. While performance varies between Member States, overall around 40% of the leading judgments of the ECtHR relating to EU Member States from the last ten years have not been implemented.²²³

No similar effort was made in relation to CJEU however with two country specific reports (Hungary and Poland) vaguely mentioning instead in July 2022 “the obligation to comply with the rule of law related rulings of the ECJ and the rule of law related infringement procedures referred to in the country chapter”. This has created a paradoxical, not to say absurd, situation where the Guardian of the EU Treaties is providing an overview of the implementation (or lack thereof) of non-EU judgments but no overview in respect of EU judgments.

²¹⁹ Ibid., para. 94.

²²⁰ Case C-156/21, para. 128 and C-157/21, para. 146.

²²¹ L. Pech and P. Bárd, *The European Commission’s Rule of Law Report*, op. cit., pp. 91-92.

²²² PA_TA(2022)0212, para. 55.

²²³ European Commission, 2022 Rule of Law Report – The rule of law situation in the European Union, COM(2022) 500 final, 13 July 2022, p. 24.

One may therefore continue to strongly recommend **the inclusion of “detailed data on Member States’ compliance with CJEU rulings** in the ARoLR as regards the four thematic areas it covers at a time where there is “an increasing number of judgments from European courts being non-implemented by EU Member States”, including CJEU judgments but also interim orders.²²⁴ In addition, it is recommended that the **Commission explains itself when it expresses concerns, serious or otherwise, in the ARoLR and yet does not initiate any enforcement action.**

Just to give an example, the Commission has inexplicably failed to bring an infringement action in respect of the systemic undermining of the preliminary ruling procedure (accompanied by the launch of disciplinary investigation against the referring judge for asking rule of law related questions) organised by Hungarian authorities in manifest breach of Article 267 TFEU and the Court of Justice’s case law. Instead, the Commission decided to describe this deliberate and fundamental violation of EU law as follows:

The Kúria has declared unlawful an order for preliminary reference to the European Court of Justice. Upon a motion by the Prosecutor General, the Kúria issued a judgment on 10 September 2019, in which it held a preliminary reference by a District Court judge to the Court of Justice to be unlawful, considering the questions irrelevant for the case at hand. [...] in October 2019, the *ad interim* president of the Budapest Regional Court [...] initiated disciplinary proceedings against the judge who issued the preliminary reference. [...] The fact that the Kúria can, in the context of an extraordinary judicial remedy, review the necessity of preliminary references could interfere with the possibility of national courts to refer questions of interpretation of Union law to the Court of Justice and that disciplinary proceedings could be initiated, could discourage individual judges from making requests for a preliminary ruling.²²⁵

The Court of Justice has since stated the obvious but on the basis of the request submitted by the referring judge mentioned above rather than on the basis of an infringement action by the Commission. In short, the Court held that EU law precludes a national supreme court from declaring a request for a preliminary ruling submitted by a lower court unlawful and similarly precludes disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice.²²⁶ Since then, **the Commission has inexplicably failed to bring an infringement action in the face of publicly announced non-compliance with the Court of Justice’s preliminary ruling.** In addition, the Commission has continued to use excessively euphemistic language in its 2022 country chapter report when referring to the open disregard of a Court of Justice’s judgment in relation to a fundamental procedure provided for by the Treaties:

The Court of Justice issued a ruling precluding the Kúria from declaring a request for preliminary ruling unlawful. [...] On the same day, the Kúria issued a statement confirming that until it decides otherwise, its decision is final and its interpretation of the law binding. The procedural rules allowing to challenge before the Kúria the necessity of a preliminary reference have not been amended.²²⁷

Beyond the ARoLR and the Commission’s failure to call a spade a spade and even briefly explain itself why infringement actions are not launched when national authorities openly disregard the Court of

²²⁴ Democracy Reporting International, “The EU rule of law report 2023 – our key items for the Commission to watch out for”, 16 January 2023: <https://democracy-reporting.org/en/office/EU/publications/the-eu-rule-of-law-report-2023-our-key-items-for-the-commission-to-watch-out-for>.

²²⁵ 2020 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, SWD(2020) 316 final, 30 September 2020, p. 4.

²²⁶ Case C-564/19, *IS (Illegality of the order for reference)*, EU:C:2021:949.

²²⁷ 2022 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, SWD(2022) 517 final, 13 July 2022, pp. 7-8.

Justice's judgements, one may note that the Commission's failure to act in the face of national systemic rule of law deficiencies was unusually noted by an Advocate General. In the context of a preliminary ruling case originating from Romania, **Advocate General Collins expressed his surprise at the lack of enforcement action by the Commission considering the Commission's own account of the rule of law deficiencies it provided to the Court:**

35. Commission reports drawn up under Article 2 of Decision 2006/928 refer to the Judicial Inspectorate's institutional structure and activity. The 2021 Report from the Commission to the Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism, observes that '[i]n recent years, judicial institutions, including the [Supreme Council of the Judiciary] itself, have highlighted concerns with the lack of accountability of the Judicial [Inspectorate], citing the high proportion of cases brought by the [Judicial Inspectorate] eventually rejected in court, the concentration of all decision-making with the Chief Inspector and the limits on the oversight powers of the [Supreme Council of the Judiciary].' In that regard, 'the Chief Inspector can only be subject to an external audit which is ordered by the [Judicial Inspectorate] itself, and then the audit report is examined only by a selected handful of members in the Council.'

36. **Despite the Commission's concerns, there is no indication in the file before the Court that that institution has initiated infringement proceedings against Romania with regard to the Judicial Inspectorate's organisation and operation.** Nor is there any indication that Romania has adopted measures to address the concerns the Commission raised in the aforementioned reports.²²⁸

In light of the above, it seems therefore warranted not only for the Parliament to request that the Commission (i) explains itself when it identifies rule of law issues and expresses concerns without availing of the enforcement tools available to it and (ii) includes data in the ARoLR country chapters regarding (non)compliance with CJEU and ECtHR judgments and orders, and similarly explains itself in situations where non-compliance with CJEU judgments and/or orders is left legally unaddressed by the Guardian of the Treaties.

The CJEU President recently recalled that "without independent judges, the rule of law is meaningless in practice".²²⁹ One could add that **without enforcement action in the face of non-compliance, the Court of Justice's rulings will become increasingly meaningless in practice.**

²²⁸ Opinion of Advocate General Collins delivered on 26 January 2023 in Case C-817/21, *Inspekția Judiciară*, EU:C:2023:55.

²²⁹ K. Lenaerts, "The Rule of Law and the Constitutional Identity of the European Union", op. cit.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, focuses on the scope of the CJEU's jurisdiction over national measures relating to the organisation of national judiciaries. After providing an overview of the legal framework post Lisbon Treaty, the study offers a chronological outline and a transversal assessment of the CJEU's case law relating to the second subparagraph of Article 19(1) TEU. Five years after the CJEU's seminal judgment in *Associação Sindical dos Juizes Portuguese*, this Treaty provision has become the main vehicle through which national measures have been brought to the CJEU's attention, primarily via national requests for a preliminary ruling.
