

ON CHECKS AND BALANCES: THE RULE OF LAW WITHIN THE EU

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The EU is, first and foremost, a 'Union of values'.¹ Those values are contained in Article 2 TEU and stand at the apex of the EU's legal order.² As the Court of Justice of the European Union (the 'Court of Justice') has put it, 'compliance by a Member State with [those] values ... is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State'.³

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¹ Koen Lenaerts, *The European Union as a Union of Democracies, Justice and Rights*, INTERNATIONAL COMPARATIVE JURISPRUDENCE 132, 136 (2017). See also Armin von Bogdandy, *Towards a Tyranny of Values ?*, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 73, 79 (Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski & Matthias Schmidt eds, 2021) who uses the expression 'community of values'.

² Lucia S. Rossi, *La valeur juridique des valeurs. L'article 2 TUE : relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 639 (2020).

³ See, e.g., *Repubblika*, Case C-896/19, EU:C:2021:311, ¶ 63; *Asociația 'Forumul Judecătorilor din România' and Others*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, ¶ 162; *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, ¶ 162, *Hungary v. Parliament and Council*, Case C-156/21, EU:C:2022:97, ¶ 126, and *Poland v. Parliament and Council*, Case C-157/21, EU:C:2022:98, ¶ 144.

That is the reason why the Court of Justice has recently 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 EU as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States’.⁴

The EU is a common legal order because the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are part of our inheritance as Europeans, and capture the true meaning behind the expression ‘an ever closer union among the peoples of Europe’.⁵ Those values are shared and cherished by ‘the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.⁶

Writing extrajudicially,⁷ I have stressed the fact that there is an unbreakable link between those founding values.⁸ Two examples taken from the case law of the Court of Justice may illustrate that point.

In the so-called *Conditionality Judgments*, the Court of Justice dismissed as unfounded two annulment actions brought respectively by Hungary and Poland against Regulation 2020/2092 establishing a horizontal conditionality mechanism.⁹ In so doing, it observed that in the context of the EU budget there is a clear link between respect for the rule of law and solidarity, which are both mentioned in Article 2 TEU. That link exists because as ‘one of the principal instruments for giving practical effect ... to the principle of solidarity’,¹⁰ the efficient implementation of the EU budget requires respect for the rule of law. Otherwise, there would be ‘no guarantee that expenditure covered by the [EU] budget satisfies

⁴ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶¶ 127 and 232, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶¶ 145 and 264. See, in this regard, Marek Safjan, *Rule of Law and the Future of Europe*, IL DIRITTO DELL’UNIONE EUROPEA 425 (2019), at 437-438, and von Bogdandy, *supra* note 1, at 86 (who observes that ‘[the] most important path to condensing the values lies in connecting these values to fundamental rights and the well-established principles of the common constitutional traditions’). See also Armin von Bogdandy & Luke D. Spieker, *Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions*, COLUMBIA JOURNAL OF EUROPEAN LAW (forthcoming) (who examine, *inter alia*, the question whether Article 2 TEU is a self-standing provision).

⁵ See Preamble to the TEU.

⁶ See Article 2 TEU.

⁷ Koen Lenaerts, *New Horizons for the Rule of Law Within the EU*, 21 GERMAN LAW JOURNAL 29, 34 (2020), and *The Two Dimensions of Judicial Independence in the EU Legal Order*, in FAIR TRIAL: REGIONAL AND INTERNATIONAL PERSPECTIVES/PROCÈS ÉQUITABLE: PERSPECTIVES RÉGIONALES ET INTERNATIONALES. LIBER AMICORUM LINOS-ALEXANDRE SICILIANOS, 333, 348 (Lubarda Branko, Iulia Motoc, Paulo Pinto de Albuquerque, Robert Spano & Maria Tsirlis eds., 2020).

⁸ See, in this regard, the Preamble to the Charter of Fundamental Rights of the European Union (the ‘Charter’), which states that those values are ‘indivisible [and] universal’.

⁹ Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, (2020) O.J. (L 4331) 1, and corrigendum (2021) O.J. (L 373) 94 (EU, Euratom).

¹⁰ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 129, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 147.

all the financing conditions laid down by EU law and therefore meets the objectives pursued by the [EU] when it finances such expenditure'.¹¹

Similarly, in order to prevent the political majority of the moment from becoming the tyranny of tomorrow and to ensure liberty and justice for all, fundamental rights and the rule of law must be upheld.¹² The rule of law, democratic principles and the protection of fundamental rights are deeply intertwined so that one cannot exist without the other two.¹³ For example, in *Commission v. Hungary (Transparency of association)*,¹⁴ the Court of Justice found that restrictions imposed by Hungary on the financing of civil organisations by persons established outside that Member State did not respect the right to freedom of association enshrined in Article 12(1) of the Charter, which is 'one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life'.¹⁵ By holding that Hungary had failed to fulfil its obligations under that provision of the Charter, the Court of Justice was also upholding the rule of law and protecting the value of democracy.

Moreover, those two examples show that the protection of the values contained in Article 2 TEU is not limited to what some have referred as the 'nuclear option' laid down in Article 7 TEU.¹⁶ On the contrary, as the Court of Justice has put it, '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, impose penalties for breaches of the values laid down in Article 2 TEU committed in a Member State'.¹⁷

As a matter of fact, the value of respect for the rule of law was upheld by the Court of Justice long before Article 7 TEU found its way into the Treaties. Suffice it to refer to the landmark judgment in *Les Verts*,¹⁸ whose reporting judge was René Joliet and for whom I worked as *référéndaire* during that time. That judgment is

¹¹ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 131, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 149.

¹² Siniša Rodin, *Liberal Constitutionalism, Rule of Law and Revolution by Other Means*, IL DIRITTO DELL'UNIONE EUROPEA 203, 244 (2021) (who eloquently states that '[the] role [of the judiciary] is to secure democratic decision making while protecting the weaker side, without jeopardizing fundamental constitutional choices').

¹³ The EU legislature has itself recognized that link. See recital 6 of Regulation 2020/2092, *supra* note 9, which states that '[w]hile there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa'.

¹⁴ *Commission v. Hungary (Transparency of association)*, Case C-78/18, EU:C:2020:476.

¹⁵ *Id.* ¶ 112. It is true that Article 2 TEU is not mentioned in that judgment. This is due to the fact that the Commission did not refer to that Treaty provision in the dispositive part of its application. That said, the link between those three values underpins, albeit implicitly, the rationale of the judgment.

¹⁶ José Manuel Durão Barroso, 'State of the Union 2012 Address', Plenary session of the European Parliament/Strasbourg, 12 September 2012, available at: <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596>

¹⁷ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 159, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 196. See Rossi, *supra* note 2, at 655, and von Bogdandy, *supra* note 1, at 84.

¹⁸ *Les Verts v. Parliament*, Case 294/83, EU:C:1986:166.

crucial as it captures the essence of the rule of law, i.e. the basic ideal that neither the EU institutions nor the Member States are above the law.¹⁹ As the EU is a ‘Union based on the rule of law’,²⁰ it establishes a multilevel system of governance of *laws*, not *men*. That is nothing new, nor unique to European integration. ‘The rule of law is the backbone of any modern democratic society’.²¹ In the EU legal order, the value of the rule of law is protected, in particular, by Article 19 TEU and by Articles 47 to 50 of the Charter, contained in Title VI, entitled ‘Justice’.²²

As the Court of Justice ruled in the *Conditionality Judgments*, ‘[the] principles of the rule of law, as developed in the case-law ..., are thus recognised and specified in the [EU] legal order ... and have their source in common values which are also recognised and applied by the Member States in their own legal systems’.²³ In light of that case law, those principles may be examined from three different perspectives.²⁴

From the first perspective, in the EU legal order, the rule of law relates to the principle of legality, according to which the exercise of public power must be grounded in a legal basis,²⁵ and not give rise to arbitrariness.²⁶ In addition, EU law must be sufficiently clear so as to allow citizens to predict the consequences of their actions,²⁷ and the decision-making process leading to the adoption of EU legislation must be underpinned by democratic principles (such as transparency, accountability

¹⁹ *Id.* ¶ 23, where the Court of Justice famously held that ‘the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.’

²⁰ See, e.g., *Associação Sindical dos Juizes Portugueses*, Case C-64/16, EU:C:2018:117, ¶ 31 and the case law cited. See also *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, Case C-216/18 PPU, EU:C:2018:586, ¶ 49.

²¹ European Commission, *A new EU Framework to strengthen the Rule of Law*, COM/2014/0158 final.

²² *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 160, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 195.

²³ See, in this regard, *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 236, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 290.

²⁴ It is worth pointing out that the EU legislature has defined, for the purposes of Regulation 2020/2092, *supra* note 9, the notion of ‘rule of law’ in Article 2(a) of that regulation. See, in this regard, *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 236, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 290, where the Court of Justice noted that ‘while it is true that Article 2(a) of [that] regulation does not set out in detail the principles of the rule of law that it mentions, nevertheless recital 3 of that regulation notes that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection and separation of powers, referred to in that provision, have been the subject of extensive case-law of the Court. The same is true of the principles of equality before the law and non-discrimination’. This means, in essence, that this provision is to be interpreted in light of that case law and in keeping with Article 2 TEU.

²⁵ *Knauf Gips v. Commission*, Case C-407/08 P, EU:C:2010:389, ¶ 91. Article 52(1) of the Charter requires that any limitation on the exercise of a fundamental right must be ‘provided by law’, ‘which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise’. See, e.g., *WebMindLicenses*, Case C-419/14, EU:C:2015:832, ¶ 81; *Opinion 1/15 (EU-Canada PNR Agreement)*, EU:C:2017:592, ¶ 139; and *Facebook Ireland and Schrems*, Case C-311/18, EU:C:2020:559, ¶¶ 175 and 176.

²⁶ *Al Chodor*, Case C-528/15, EU:C:2017:213, ¶ 43, and *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114, ¶ 48.

²⁷ See, e.g., *Recorded Artists Actors Performers*, Case C-265/19, EU:C:2020:677 ¶¶ 86-87.

and pluralism).²⁸ Moreover, the rule of law within the EU is not an ‘empty vessel’ in which all norms regardless of their content may ‘come on board’. On the contrary, in the EU legal order substance matters and respect for the rule of law requires the entire body of EU law to comply with the values on which the EU is founded,²⁹ such as respect for fundamental rights.³⁰

From the second perspective, the rule of law within the EU focuses on the proper administration of justice.³¹ That focus is, in my view, threefold, since it looks at *how* one may have access to justice, *how* justice is served and *how* it is enforced. To begin with, respect for the rule of law implies that for every EU right, there must be an effective remedy (‘ubi jus ibi remedium’).³² A remedy may only be effective where individuals have access to justice,³³ and enjoy the full protection of their rights, obtaining, as the case may be, interim,³⁴ injunctive,³⁵ declaratory,³⁶ and/or monetary relief.³⁷ Access to justice does not mean, however, that Article 47 of the Charter may confer jurisdiction on the Court of Justice, where the Treaties exclude it.³⁸ That said, respect for the rule of law does require such an exclusion to be interpreted restrictively, as the case law relating to the CFSP reveals.³⁹ In addition, the extent of the financial risk of bringing judicial proceedings may not be such as to deter individuals from initiating them. In Opinion 1/17, for example, the Court of Justice found that the CETA was, *inter alia*, compatible with EU law in so far as the Commission and the Council had given a commitment to ensure that the envisaged

²⁸ See, e.g., *Council v. Access Info Europe*, Case C-280/11 P, EU:C:2013:671, ¶ 33. (holding that ‘[o]penness [when the Council acts in its legislative capacity] contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights’).

²⁹ See Article 2 TEU.

³⁰ *Kadi and Al Barakaat International Foundation v. Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461, ¶¶ 281-285.

³¹ See Sacha Prechal, *Effective Judicial Protection: some recent developments – moving to the essence*, 13 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 175 (2020).

³² See *Rosneft*, Case C-72/15, EU: C:2017:236, ¶ 73, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, ¶ 35, and *Bank Refah Kargaran v. Council*, Case C-134/19 P, EU:C:2020:793, ¶ 36 (holding that ‘[t]he very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law’).

³³ *DEB*, Case C-279/09, EU:C:2010:811. See also Opinion of Advocate General Cruz Villalón in *Joined Cases Gbagbo and Others v. Council*, C-478/11 P to C-482/11 P, EU:C:2012:831, ¶ 72 (holding that ‘since the Union is clearly a community based on the rule of law, that system must respond to the demands inherent in access to justice, as a necessary part of the right to effective judicial protection, now guaranteed by Article 47 of the Charter’).

³⁴ According to settled case law, ‘a national court seised of a dispute governed by [EU] law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law’. See, in this regard, *Factortame and Others*, Case C-213/89, EU:C:1990:257, ¶ 21; *Križan and Others*, Case C-416/10, EU: C:2013:8, ¶ 107, and *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, *Joined Cases C-924/19 PPU and C-925/19 PPU*, EU: C:2020:367, ¶ 29.

³⁵ See, e.g., *UPC Telekabel Wien*, Case C-314/12, EU: C:2014:192, and *Deutsche Umwelthilfe*, EU: C:2019:1114.

³⁶ See, e.g., *Braathens Regional Aviation*, Case C-30/19, EU:C:2021:269.

³⁷ *Brasserie du pêcheur and Factortame*, *Joined Cases C-46/93 and C-48/93*, EU:C:1996:79, ¶¶ 20, 39 and 52, and *Tomášová*, Case C-168/15, EU: C:2016:602, ¶ 18 and the case law cited.

³⁸ *Rosneft*, EU:C:2017:236, ¶ 74.

³⁹ *Id.* See also *Bank Refah Kargaran v. Council*, Case C-134/19 P, EU:C:2020:793, ¶ 32.

CETA tribunals would be financially accessible by small and medium-sized investors so as to meet the requirements of Article 47 of the Charter.⁴⁰

Next, as the Court of Justice famously held in *Associação Sindical dos Juizes Portugueses*, it is for the Member States to provide effective judicial protection of EU rights, which may only be provided by courts that are independent.⁴¹ That requirement, which ‘is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial’,⁴² both rights being enshrined in Article 47 of the Charter of Fundamental Rights of the EU (the ‘Charter’). In the EU legal order, the concept of judicial independence, as developed in the seminal *Wilson* judgment,⁴³ has both an internal and an external component. Internally, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. In other words, independence requires courts to be impartial.⁴⁴ Externally, judicial independence draws the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them. Ultimately, the principle of judicial independence seeks to exclude any ‘political control over the content of judicial decisions’.⁴⁵

Moreover, for the purposes of the fundamental right to a fair trial, within the meaning of Article 47 of the Charter, the Court of Justice has highlighted the importance of the links that exist ‘between the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law’.⁴⁶ In particular, regarding the judicial appointment procedure, those links exist because that procedure constitutes an inherent element of the concept of a ‘tribunal established by law’, whilst also being a factor by which the independence of the judges appointed ‘may be measured’.⁴⁷ Those two guarantees ‘seek to observe the fundamental principles of the rule of law and the separation of powers’, both of which are common to the Member States in a society in which, *inter alia*, justice prevails.⁴⁸

In addition, public authorities must not call into question the position taken by a court in a final decision. As the Court of Justice held in *Torubarov*, ‘the right to an effective remedy would be illusory if a Member State’s legal system were to allow a

⁴⁰ Opinion 1/17 (EU-Canada CET Agreement), EU:C:2019:341, ¶ 218.

⁴¹ *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, ¶ 41; *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, ¶ 53, and *Commission v. Poland (Independence of the Supreme Court)*, Case C-619/18, EU:C:2019:531, ¶ 57.

⁴² *Commission v. Poland (Independence of the ordinary courts)*, EU:C:2019:924, ¶ 106 and the case law cited.

⁴³ *Wilson*, Case C-506/04, EU:C:2006:587, ¶¶ 49-52.

⁴⁴ *Banco de Santander*, Case C-274/14, EU:C:2020:17, ¶¶ 57-63.

⁴⁵ *Asociația ‘Forumul Judecătorilor din România’ and Others*, EU:C:2021:393, ¶ 198 and case law cited.

⁴⁶ *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, Joined Cases C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, ¶ 56.

⁴⁷ *Id.*, ¶ 57.

⁴⁸ *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, Case C-487/19, EU:C:2021:798, ¶ 127 and case law cited.

final, binding judicial decision to remain inoperative to the detriment of one party'.⁴⁹ In the same way, 'the fact that the public authorities do not comply with a final, enforceable judicial decision', the Court wrote in the seminal *Deutsche Umwelthilfe*, 'deprives [Article 47 of the Charter] of all useful effect'.⁵⁰ In the EU legal order, the principle of finality of judgments also applies to those issued by the Court of Justice. Accordingly, when it comes to the interpretation of EU law, the Court of Justice has the *final* say,⁵¹ and when it comes to the validity of that law, it has the *only* say.⁵² Otherwise, if public authorities, in general, and national courts, in particular, were to second-guess the interpretation of EU law put forward by the Court of Justice, the rule of law within the EU would become no more than the rule of lawlessness.⁵³

From the third and last perspective, respect for the rule of law within the EU implies that both the EU institutions and the Member States adopt safeguards in order to protect the EU's constitutional structure. Seen in this light, the rule of law focuses on protecting the institutional design and the structured network of legal norms provided for by the Treaties.⁵⁴ The principle of mutual trust illustrates that point. Since by virtue of that principle, the Member States are deemed equally committed to respecting the values on which the EU is founded, including respect for the rule of law, it enables the establishment and proper functioning of an Area of Freedom, Security and Justice (the 'AFSJ').⁵⁵ National measures that call into question the rule of law within the EU undermine that mutual trust, giving rise to the fragmentation of the AFSJ.

Needless to say, those three perspectives overlap in practice. For example, laws that adversely affect the independence of national courts open the door to the arbitrary exercise of public power, undermine the proper administration of justice and call into question the uniform interpretation and application of EU law as well as the principle of mutual trust. Such overlapping can also be found in the normative content of Articles 19(1) TEU, 267 TFEU and 47 of the Charter.⁵⁶ In relation to

⁴⁹ *Torubarov*, Case C-556/17, EU:C:2019:626, ¶ 57.

⁵⁰ *Deutsche Umwelthilfe*, EU: C:2019:1114, ¶ 37.

⁵¹ See, in this regard, *Republic of Moldova*, Case C-741/19, EU:C:2021:655, ¶ 45, and *RS (Effects of the decisions of a constitutional court)*, Case C-430/21, EU:C:2022:99, ¶ 52.

⁵² *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 71.

⁵³ See, on this point, Koen Lenaerts, *No Member State is More Equal than Others*, in GERMAN LEGAL HEGEMONY? MPIL RESEARCH PAPER SERIES no. 2020-43, 37 (Armin von Bogdandy and Anne Peters eds, 2020). See also Opinion of Advocate General Tanchev in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, Case C-824/18, EU:C:2020:1053, ¶¶ 80-84.

⁵⁴ For a structural understanding of rule of law, in general, and of judicial independence, in particular, see Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 346. See also Panagiotis Zinonos, *Judicial Independence & National Judges in the Recent Case Law of the Court of Justice*, 25 EUROPEAN PUBLIC LAW 615 (2019); Aida Torres Pérez, *From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence*, 27 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 105, 111 (2020), and von Bogdandy, *supra* note 1, at 80.

⁵⁵ *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, ¶ 35 and the case law cited.

⁵⁶ See Opinion of Advocate General Tanchev in *Commission v. Poland (Disciplinary Regime for Judges)*, Case C-791/19, EU:C:2021:366, ¶¶ 69, 71 and 72 (holding that 'there is a "constitutional passerelle" between the second subparagraph of Article 19(1) TEU and Article 47 of the Charter and the case-law concerning them inevitably intersects, given that those provisions share common legal sources. Thus, the rights covered by each are bound to overlap, and the second subparagraph of Article 19(1) TEU

those provisions, the Court of Justice has engaged in a cross-fertilisation of its case law when determining the meaning of the principle of judicial independence.⁵⁷ This is so despite the fact that those provisions do not have the same scope of application, and cover different dimensions of that principle.

As the title of my contribution reveals, I shall argue that the Court of Justice has interpreted the rule of law within the EU in keeping with the checks and balances laid down in the Treaties. To that end, my contribution is divided into two parts. Part I highlights the structural considerations that played an essential role in the seminal judgments of the Court of Justice *Associação Sindical dos Juízes Portugueses*,⁵⁸ *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*,⁵⁹ *Commission v. Poland (Independence of the Supreme Court)*,⁶⁰ and *Miasto Łowicz*.⁶¹ It posits that upholding the rule of law within the EU serves to protect the EU's constitutional structure in general and the EU's judicial architecture in particular. At the same time, respect for the rule of law also means that the Court of Justice may not overstep the limits of its jurisdiction, but must actively enforce those limits. Part II examines to what extent upholding the rule of law within the EU allows room for diversity. In my view, the rule of law within the EU is not 'one rule to rule them all'. Each Member State has its own understanding of what respect for the rule of law exactly means, and rightly so.⁶² However, in order to fit in with the European integration project,⁶³ the national understanding of the rule of law is 'circumscribed' by the contents of the rule of law at EU level.⁶⁴ These contents do not militate in favour of a single, specific constitutional model, but limit themselves to providing a 'framework of reference' compliance with which protects the values on which the EU is founded: such a framework favours mutual trust among the Member States, and enables the smooth interlocking of legal orders. It is a prerequisite for the creation and proper functioning of an area without internal frontiers where citizens may move freely and securely. Finally, some concluding remarks support the contention that if Europeans are to reach a new frontier in their quest for an ever-

includes, but is not limited to, the obligation to have independent and impartial courts'. In his view, drawing from the content of Articles 47 and 48 of the Charter, the latter Treaty provision includes the right to a court established by law, the right to have a case examined within a reasonable time and the rights of the defence).

⁵⁷ This was made explicitly clear by the Court in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, Case C-824/18, EU:C:2021:153, ¶ 143 (holding that '[the] second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law ..., meaning that the latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU').

⁵⁸ *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117

⁵⁹ *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586.

⁶⁰ *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531.

⁶¹ *Miasto Łowicz and Prokurator Generalny*, Joined Cases C-558/18 and C-563/18, EU:C:2020:234.

⁶² *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 43, and *Euro Box Promotion and Others*, EU:C:2021:1034, ¶ 229 and the case-law cited. For a comparative law study of the meaning of the rule of law, see Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 SOUTHERN CALIFORNIA LAW REVIEW 1307 (2001).

⁶³ *Repubblika*, EU:C:2021:311, ¶ 63.

⁶⁴ This is known in French academia as « *la théorie de l'encadrement* ». For an illustration of how this theory works in the EU legal order, see Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 FORDHAM INTERNATIONAL LAW JOURNAL 1338 (2011).

closer union, *integration through the rule of law* is the only way forward.⁶⁵ Crucially, this means that authoritarian tendencies at national level have simply no room in the EU legal order.⁶⁶

I. STRUCTURALISM AND THE RULE OF LAW WITHIN THE EU

A. *National courts as an essential building block of the EU's constitutional structure*

As the Court of Justice observed in Opinion 2/13, the EU has its own constitutional structure that enables it to uphold the values on which it is founded, and to attain the objectives set out in the Treaties. This constitutional structure not only includes the EU institutional design but also ‘a [network] of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other’.⁶⁷

As an essential component of that constitutional structure, the EU's judicial architecture serves to secure the operation of the principles of effective judicial protection and of equality before the law. Both principles are an integral part of the rule of law within the EU.⁶⁸ The EU's judicial architecture further seeks to facilitate the operation of the twin principles of mutual trust and mutual recognition. That architecture includes not only the EU Courts (the Court of Justice and the General Court) but also the courts of the Member States, which are the courts of general jurisdiction for the application and enforcement of EU law. National courts are therefore an essential building block of the EU's constitutional structure,⁶⁹ playing three vital roles within it. First and foremost, they are to provide individuals with effective judicial protection of their EU rights. It is therefore for the Member States, in accordance with Article 19(1) TEU, to provide ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law’. Second, national courts in cooperation with the Court of Justice secure the uniform interpretation and application of EU law and in so doing, they guarantee that EU law has the same meaning throughout the Member States. Since there is no equality before EU law without such uniform interpretation and application, Member States must refrain from adopting measures that may undermine the operation of the preliminary reference mechanism,⁷⁰ laid down in Article 267 TFEU, which is the ‘keystone of the EU judicial system’.⁷¹ Third and last, in order to establish an AFSJ which guarantees the free movement of judicial decisions, national courts must trust each

⁶⁵ Lenaerts, *New Horizons for the Rule of Law Within the EU*, *supra* note 7, at 34.

⁶⁶ Rodin, *supra* note 12, at 230.

⁶⁷ Opinion 2/13 (Accession of the European Union to the ECHR), EU:C:2014:2454, ¶ 167. See K. Lenaerts & José A. Gutiérrez-Fons, *A Constitutional Perspective*, OXFORD PRINCIPLES OF EUROPEAN UNION LAW, Vol. 1, The European Union Legal Order 1034 (Takis Tridimas, Robert Schütze eds, 2018).

⁶⁸ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 229, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 324.

⁶⁹ Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 346.

⁷⁰ A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, ¶¶ 56-57.

⁷¹ *Id.* 176. See also *Achmea*, Case C-284/16, EU:C:2018:158, ¶ 37, and *XC and Others*, Case C-234/17, EU:C:2018:853, ¶ 41

other in that they are equally committed to providing effective judicial protection to the EU rights.

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. *Without judicial independence*, there is no effective judicial protection of EU rights ‘which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded’.⁷² *Without judicial independence*, a court may not engage in a dialogue based on the law – and the law only – with the Court of Justice. *Without judicial independence*, national courts stop trusting each other, leading to the fragmentation of the AFSJ.⁷³

Logically, the question that arises is how EU law protects the independence of national courts and in so doing, the EU’s constitutional structure. That question is examined in the following section by looking at the scope of application of the relevant provisions of EU law.

B. How is judicial independence of national courts protected under EU law

1. Protecting national judges in their institutional capacity

To begin with, Article 19(1) TEU, which gives concrete expression to the rule of law,⁷⁴ imposes on the Member States the obligation to provide for effective remedies ‘in the fields covered by EU law’. Given that there is an unbreakable link between effective remedies and independent courts, Article 19(1) TEU obliges the Member States to protect the independence of their courts. Since that independence serves, in turn, to protect the integrity of the EU judicial architecture, the Court of Justice has interpreted the scope of application of Article 19(1) TEU in the light of structural considerations.

Unlike Article 51(1) of the Charter, the application of Article 19(1) TEU is not made conditional upon EU law being implemented in the case at hand. That Treaty provision applies where a particular body, which is considered to be a ‘court or tribunal’ within the meaning of EU law, enjoys jurisdiction over questions pertaining

⁷² *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, ¶ 45, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 58, and *Commission v. Poland (Independence of ordinary courts)*, EU:C:2019:924, ¶ 106; *Simpson v. Council and HG v. Commission*, Case C-542/18 RX-II and C-543/18 RX II, EU:C:2020:232, ¶¶ 70 and 71; *Land Hessen*, Case C-272/19, EU:C:2020:535, ¶ 45; *Openbaar Ministerie (Independence of the issuing judicial authority)*, Joined Cases C-354/20 PPU et C-412/20 PPU, EU:C:2020:1033, ¶ 39; *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶ 108, and *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, Joined Cases C-748/19 to C-754/19, EU:C:2021:931, ¶ 66.

⁷³ The Court of Justice has summarised those three aspects of judicial independence in its case law. See *Land Hessen*, EU:C:2020:535, ¶ 45.

⁷⁴ *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, ¶ 50 and the case law cited. See also *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 47, and *Commission v. Poland (Independence of ordinary courts)*, EU:C:2019:924, ¶ 98.

to the interpretation and application of EU law.⁷⁵ If that is the case, Article 19(1) TEU applies, protecting the independence of such a court. It follows that this Treaty provision 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.⁷⁶

In particular, unlike Article 47 of the Charter, the scope of application of Article 19(1) TEU is not limited to protecting the rights that EU law confers on individuals.⁷⁷ Acting in an individual capacity (as the holder of EU rights), a judge, just like any person, has the right to effective judicial protection of his or her EU rights before ‘an independent judge or tribunal’ as provided for by Article 47 of the Charter. For example, where a judge considers that he or she has been victim of discrimination on grounds of age, he or she may bring an action in the competent court, which must be independent.⁷⁸ By contrast, when bringing an action in an institutional capacity, a judge is not acting as the holder of EU rights but as a body who wields EU judicial power (as the ‘arm of EU law’). Where the independence of such a judge is being undermined by executive or legislative action, he or she may bring proceedings before another court on the ground that such course of action is contrary to Article 19(1) TEU. This is so regardless of whether his or her EU rights are directly at issue.⁷⁹

That said, whilst Article 47 of the Charter and Article 19(1) TEU cover different dimensions of judicial independence (the first as fundamental right, the second as a concrete expression of the rule of law),⁸⁰ both provisions give the same normative content to it.⁸¹ First, they both cover internal and external independence. Both provisions also cover the guarantee of access to a tribunal previously established by law.⁸² Second, both provisions apply with regard to all rules that may adversely affect the independence of Member State courts. Those rules relate *inter alia* to the

⁷⁵ *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, ¶ 29, and *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 82 and the case law cited.

⁷⁶ Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 346.

⁷⁷ *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶¶ 87–88. *Repubblica*, EU:C:2021:311, ¶ 41.

⁷⁸ For example, in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, ¶ 79, the Court of Justice applied Article 47 of the Charter since the applicants in the main proceedings, who were two judges of the Polish Supreme Court, ‘relied, *inter alia*, on infringements to their detriment of the prohibition of discrimination in employment on the ground of age, which is provided for by Directive 2000/78’. See, in the same way, *Commission v. Hungary*, Case C 286/12, EU:C:2012:687.

⁷⁹ See, for example, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

⁸⁰ See, in this regard, Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7. In *Repubblica*, EU:C:2021:311, ¶ 52, the Court of Justice explicitly referred to those two dimensions. It held that ‘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’.

⁸¹ Prechal, *supra* note 31, at 179.

⁸² *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶ 122.

composition of a ‘court or tribunal’,⁸³ within the meaning of EU law, and the appointment, length of service and grounds for abstention, recusal and dismissal of its members. In particular, they may relate to disciplinary matters,⁸⁴ secondments,⁸⁵ and involuntary transfers.⁸⁶ Third, the Court of Justice has explicitly stated that the interpretation of Article 19 TEU draws on that of Article 47 of the Charter.⁸⁷ Fourth and last, both provisions produce direct effect.⁸⁸

As to the procedural avenues for invoking Article 19(1) TEU before the Court of Justice, a distinction must be drawn between infringement actions and the preliminary reference mechanism. In the context of infringement actions, the application of Article 19(1) TEU only requires the independence of the courts of the defendant Member State which may be called upon to rule on questions relating to the interpretation of EU law, to be adversely affected by the national measure(s) or practice(s) challenged by the Commission (or another Member State). If that is the case, the Court of Justice will find that Article 19(1) TEU applies and proceed to examine the merits of the action.⁸⁹ Given that infringement actions seek to determine whether the defendant Member State infringes EU law in general, there is no need for there to be a relevant dispute before the national courts.⁹⁰

Article 19(1) TEU may not, however, be construed in such a way as to change the function of the Court of Justice in the context of the preliminary reference mechanism, which ‘is ... to help the referring court to resolve the specific dispute pending before that court’.⁹¹ As the Court of Justice observed in *Miasto Łowicz*, access to the preliminary reference mechanism is made conditional upon the existence of a connecting factor between the interpretation of Article 19(1) TEU sought by the referring court and the dispute before it.⁹² That connecting factor may be of a substantive or procedural nature. For example, in *Associação Sindical dos Juízes Portugueses*, it was substantive since the referring court had to decide whether it annulled administrative decisions reducing the salaries of members of the Tribunal de Contas (Court of Auditors) on the ground that the national legislation providing

⁸³ Both the Court of Justice and the ECtHR have ruled that the right to an independent judge or tribunal “established by the law” -- as provided for by Articles 6 ECHR and 47 of the Charter -- “encompasses, by its very nature, the process of appointing judges.” “[An] irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter.” See *Simpson v. Council and HG v. Comm’n*, EU:C:2020:232, ¶¶ 73 - 75. As to the ECtHR, see *Guðmundur Andri Ástráðsson v. Iceland* [Grand Chamber], app. no. 26374/18, CE:ECHR:2020:1201JUD002637418, ¶ 98.

⁸⁴ See, e.g., *Comm’n v Poland (Disciplinary regime for judges)*, Case C-791/19, EU:C:2021:596, ¶ 1.

⁸⁵ See *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931.

⁸⁶ See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798.

⁸⁷ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, ¶ 143, and *Repubblica*, EU:2021: EU:C:2021:311, ¶ 45.

⁸⁸ *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 146.

⁸⁹ See *Comm’n v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶¶ 55-59, and *Comm’n v. Poland (Independence of ordinary courts)*, EU:C:2019:924, ¶¶ 104-107.

⁹⁰ *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, ¶ 47.

⁹¹ *Id.* See also *Repubblica*, EU:2021: EU:C:2021:311, ¶ 48.

⁹² *Miasto Łowicz and Prokurator Generalny*, EU: C:2020:234, ¶ 48. However, see Kim L. Scheppele, *The Responsibility of the European Commission to Ensure the Rule of Law*, COLUMBIA JOURNAL OF EUROPEAN LAW (forthcoming) (who advocates a broad interpretation of that link).

for such reduction was incompatible with Article 19(1) TEU.⁹³ In *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, that connecting factor was procedural, since the interpretation of Article 19(1) TEU was sought in order to determine the competent court for the purposes of settling disputes relating to EU law.⁹⁴ In more recent cases, the Court has declared admissible references that relate to procedural questions of national law raised *in limine litis*, before the referring court can, as required, rule on the substance of the case.⁹⁵

Similarly, in *IS (Illegality of the order for reference)*,⁹⁶ the *Kúria* (the Supreme Court of Hungary) decided, upon an appeal brought in the interest of the law by the Prosecutor General, that a request for a preliminary ruling which had been submitted to the Court of Justice by a first instance court, sitting as a single-judge formation, was unlawful on the ground that the questions referred were not necessary for that court to give judgment, without, however, altering the legal effects of that request. Following this decision of the *Kúria*, the referring court added new questions to its initial request, asking, in essence, whether EU law was to be interpreted as opposing that decision. The Court of Justice replied in the affirmative, holding that the decision of the *Kúria* encroached upon the exclusive jurisdiction of the Court to rule on the admissibility of the questions referred for a preliminary ruling.⁹⁷ The referring court also drew the attention of the Court of Justice to the fact that disciplinary proceedings had been brought against the judge sitting as a single-judge court following the decision of the *Kúria* and on the same grounds. Accordingly, the referring judge asked whether EU law precluded those proceedings from being brought against him on the ground that he had made a reference to the Court of Justice. Hungary contested the admissibility of that question, since those disciplinary proceedings had subsequently been brought to an end. However, the Court of Justice upheld the admissibility of that question, given that the referring judge needed to know ‘whether he will be able to refrain from complying with the *Kúria* decision when he rules on the substance of the case in the main proceedings without having to fear that, in so doing, the disciplinary proceedings that were brought against him, based on the *Kúria* decision, will be reopened’.⁹⁸ Thus, the referring judge needed to resolve a procedural question before being able to rule on the substance of the dispute before him.

By contrast, in *Miasto Łowicz*, that connecting factor was missing, since an answer to the questions referred by the national courts was not objectively needed for the resolution of the disputes in the main proceedings.⁹⁹ Those questions, which

⁹³ Associação Sindical dos Juizes Portugueses, EU:C:2018:117, ¶ 12. See, in the same way, *Escribano Vindel*, C-49/18, EU:C:2019:106.

⁹⁴ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶¶ 99-100.

⁹⁵ See, for example, *W.Ž. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶ 94; *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931, ¶ 49, and *Getin Noble Bank*, Case C-132/20, EU:C:2022:235, ¶ 67.

⁹⁶ *IS (Illegality of the order for reference)*, Case C-564/19, EU:C:2021:949, ¶ 148.

⁹⁷ *Id.* ¶ 72.

⁹⁸ *Id.* ¶ 86.

⁹⁹ See also order of 3 September 2020, *S.A.D. Maler und Anstreicher*, Case C-256/19, EU:C:2020:684, ¶ 49. In that case, the referring court took the view that the case at issue in the main proceedings was not properly allocated to it. It thus asked the Court of Justice whether such allocation

were of a general nature, sought to determine whether the legislative reforms affecting the disciplinary proceedings applicable to judges called into question the principle of judicial independence within the meaning of Article 19(1) TEU. It is worth noting that the judges who made the references were, as a result of making them, the subject of an investigation prior to the possible initiation of disciplinary proceedings against them. However, the dispute in the main proceedings did not relate to that investigation which was, in any event, closed since no disciplinary misconduct was found.¹⁰⁰

In my view, it is rather straightforward to establish the connecting factor between Article 19(1) TEU and the dispute in the main proceedings in cases where the judges whose independence is being threatened are parties to those proceedings. In order to ensure compliance with the rule of law, those judges must have access to justice. The Court of Justice has been categorical in that respect, holding that an independent court of law must provide them with effective remedies. Just like any other individual, a national judge – who seeks to challenge measures that he or she deems incompatible with judicial independence – has a right to an independent court or tribunal. Since Article 19(1) TEU produces direct effect, applicants may rely on that Treaty provision in order to set aside conflicting national measures. For example, in *Associação Sindical dos Juízes Portugueses*, the applicant, an association representing members of the Tribunal de Contas (Portuguese Court of Auditors), claimed before the Portuguese Supreme Administrative Court that salary-reduction measures passed by the Portuguese legislature were contrary to the principle of judicial independence. The Court of Justice held that Article 19(1) TEU applied to the case at hand, provided that the Tribunal de Contas was a court within the meaning of EU law that was called upon to interpret and apply that law. On the merits, it found, however, that the judicial independence of those members was not called into question by the salary-reduction measures at issue since those measures were of general application, proportional and temporary.

Similarly, the connecting factor is even more straightforward where the applicant, who is a judge, seeks judicial protection of his or her EU rights. In that type of situations, both Article 47 of the Charter and Article 19(1) TEU apply to the case at hand. For example, in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the applicants in the main proceedings, who were judges of the Polish Supreme Court, challenged their early retirement which was brought about by the entry into force of new national legislation. They argued that that legislation was incompatible with the prohibition of non-discrimination on grounds of age set out in Directive 2000/78. Since effective judicial protection must be afforded to the rights contained in that directive, the Court of Justice held that the contested measures ‘implemented EU law’ within the meaning of Article 51(1) of

complied with Article 19(1) TEU. However, the Court of Justice declared the reference inadmissible, since a connecting factor between the dispute in the main proceedings and that Treaty provision was missing. Substantively, Article 19(1) TEU was not required to solve the merits of the dispute in the main proceedings. Procedurally, there was no connecting factor either: the referring court could not call into question the lawfulness of the allocation in the context of the main proceedings, but that question fell within the jurisdiction of a superior court in the event of an appeal.

¹⁰⁰ See *Miasto Łowicz and Prokurator Generalny*, EU: C:2020:234, ¶¶ 56-59. See *infra* notes 118 and 119, and accompanying text.

the Charter, so that Article 47 of the Charter applied to the cases at hand.¹⁰¹ The Court of Justice then went on to find that Article 47 of the Charter precludes a Member State from stripping a court of its jurisdiction over disputes concerning the retirement regime applicable to judges in order to confer that jurisdiction on another court that is not independent.¹⁰² The Court of Justice also held that the same reasoning applied in respect of Article 19(1) TEU.¹⁰³

Conversely, the connecting factor is missing where the referring court seeks to have access to the preliminary reference mechanism in order to question, in a general fashion, whether legislative reforms comply with the principle of judicial independence, in so far as that question has no bearing on the main proceedings.¹⁰⁴ The reason for imposing such connecting factor lies again in structural considerations that seek to draw a clear distinction between the preliminary reference mechanism and infringement actions.

Moreover, the judgment of the Court of Justice in *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court - Appointment)*,¹⁰⁵ suggests that the connecting factor between the interpretation of Article 19(1) TEU sought by the referring court and the dispute before it must be of a direct nature. In that case, the Court of Justice declared the reference inadmissible. It reasoned that ‘the questions referred to the Court in the present case relate intrinsically to a dispute other than that in the main proceedings, to which the latter is in fact merely incidental. In those circumstances, the Court would be obliged, in order fully to determine the scope of those questions and to provide them with an appropriate answer, to have regard to the relevant factors characterising that other dispute rather than to confine itself to the configuration of the dispute in the main proceedings, as required however by Article 267 TFEU’.¹⁰⁶ In addition, the referring court had said itself that it had, under national law, no jurisdiction to rule on that ‘other’ dispute, which related to the circumstances in which a judge was appointed to the Disciplinary Chamber of the Polish Supreme Court and in which the latter judge adopted a decision designating the disciplinary court in charge of examining the disciplinary proceedings brought against the applicant.¹⁰⁷ It is worth noting that, in an obiter dictum, the Court of Justice pointed towards the procedural avenue that the applicant should have followed: by virtue of Article 19(1) TEU, the applicant ‘could have raised before

¹⁰¹ A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), EU:C:2019:982, ¶¶ 79-81.

¹⁰² *Id.* ¶ 166.

¹⁰³ *Id.* ¶¶ 168 and 169.

¹⁰⁴ See Opinion of Advocate General Pikamäe in IS (Illegality of the order for reference), C-564/19, EU:C:2021:292.

¹⁰⁵ *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court - Appointment)*, Case C-508/19, EU:C:2022:201, ¶¶ 69 to 71.

¹⁰⁶ *Id.* ¶ 71. See, in this regard, *id.* ¶ 63 (‘[in] the present case, ... the civil action brought by the applicant in the main proceedings does indeed formally seek a declaration that a service relationship does not exist between J.M. and the Sąd Najwyższy (Supreme Court). However, the description of the dispute in the main proceedings set out in that decision makes it clear that [the applicant] challenges not so much the existence of such a contractual or administrative relationship between J.M. and the Sąd Najwyższy (Supreme Court) in their respective capacities as employee and employer, or that of rights or obligations arising from such a service relationship between the parties thereto, as the circumstances in which J.M. was appointed judge in the disciplinary chamber of that court’.)

¹⁰⁷ *Id.*, ¶¶ 25 and 26.

that [disciplinary] court an objection alleging a possible infringement, arising from that decision, of her right to have the said dispute determined by an independent and impartial tribunal previously established by law'.¹⁰⁸

That said, such connecting factor is present where national rules of procedure provide for actions that enable applicants to challenge laws directly and in an abstract fashion, without having to demonstrate any individual interest in the outcome of the proceedings. For example, in *Repubblika*, the Court of Justice declared admissible a reference made by a Maltese court in the context of an *actio popularis* brought by an association whose purpose was to promote the rule of law in Malta. This association argued that the Maltese system of appointments of judges, as provided for by the Maltese Constitution, was incompatible with Article 19(1) TEU.¹⁰⁹ Just like the dispute at issue in *Associação Sindical dos Juizes Portugueses*, there was a substantive connecting factor between Article 19(1) TEU and the dispute in the main proceedings since the interpretation of that Treaty provision by the Court of Justice would contribute to determining whether the *actio popularis* was to be successful or not.¹¹⁰

2. Protecting the preliminary reference mechanism

As to Article 267 TFEU, one must draw a distinction between cases where the independence of the referring court is called into question,¹¹¹ and cases where national measures interfere with the dialogue between that court and the Court of Justice and in so doing, disrespect the principle of judicial independence.

In relation to the first type of cases, compliance with the principle of judicial independence is examined as an admissibility requirement. In *Land Hessen*, the Court of Justice stated that it would only look at factors that may call into question the independence of the judges that made the reference, but not at those that are irrelevant for the case at hand.¹¹² For example, the referring court questioned whether ‘temporary judges’, i.e. civil servants with a legal background who covered temporary staff requirements in the judiciary of Land Hessen, were independent. However, ‘since such judges [were] not members of the formation of the [referring] court’, the Court of Justice found that the question of temporary judges to be manifestly irrelevant.¹¹³

Most importantly for present purposes, in *Getin Noble Bank*, the Court of Justice held that ‘[in] so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies [the requirements by reference to which EU law defines the notion of ‘court or tribunal’], irrespective of its actual

¹⁰⁸ *Id.* ¶ 72.

¹⁰⁹ *Repubblika*, EU:2021: EU:C:2021:311, ¶ 34.

¹¹⁰ *Id.*, ¶ 27.

¹¹¹ I refer here to courts that form part of the judiciary of the Member State concerned, as opposed to bodies that do not form part of that judiciary and may – or may not – comply with the definition of ‘court or tribunal’ within the meaning of Article 267 TFEU. For example, Cf. *Consorti Sanitari del Maresme*, Case C-203/14, EU:C:2015:664, ¶ 17, with *Banco de Santander*, EU:C:2020:17, ¶ 50.

¹¹² *Land Hessen*, Case C-272/19, EU:C:2020:535, ¶¶ 46 and 47.

¹¹³ *Id.* ¶ 49

composition'.¹¹⁴ A court or tribunal that forms part of the judiciary of the Member State concerned is therefore presumed to be a 'court or tribunal' within the meaning of Article 267 TFEU. However, that presumption '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'.¹¹⁵ That said, the scope of that presumption is limited to the admissibility requirements under Article 267 TFEU. It does not follow from that presumption 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.¹¹⁶ Stated differently, that presumption says nothing as to whether the referring court provides effective judicial protection to the rights of the parties before it.

As to the second type of cases, it is settled case law that Article 267 TFEU confers on national courts the widest discretion in referring matters to the Court of Justice. Accordingly, national measures that curtail that discretion are incompatible with EU law.¹¹⁷ Whilst declaring the reference in *Miasto Łowicz* inadmissible, the Court of Justice did send, nevertheless, a clear message regarding measures that prevent a court from using that discretion. In an obiter dictum, it recalled that Article 267 TFEU will protect any judge who is subject to disciplinary proceedings as a result of making a reference. Those disciplinary proceedings 'cannot be permitted', since not only do they interrupt the dialogue between the Court of Justice and the referring court, but also undermine the judicial independence of the latter court.¹¹⁸ This obiter dictum constitutes an important development in the case law of the Court of Justice since it incorporates the discretion of the judge to make a reference into the content of the principle of judicial independence. In his Opinion in *Commission v. Poland (Disciplinary Regime for Judges)*, AG Tanchev drew on that obiter dictum, adding that the prospect of disciplinary proceedings against courts which made a reference could have a 'chilling effect' on all courts of the Member State concerned, since those courts would, in future cases, think twice before engaging in a dialogue with the Court of Justice. In his view, that prospect 'strikes at the heart of the procedure governed by Article 267 TFEU and with it, the very foundations of the Union itself'.¹¹⁹

¹¹⁴ *Getin Noble Bank*, EU:C:2022:235, ¶ 69.

¹¹⁵ *Id.* ¶ 72. In *Advance Pharma sp. z o.o v. Poland*, app. no. 1469/20, CE:ECHR:2022:0203JUD000146920, the ECtHR found that the Civil Chamber of the Supreme Court in which the referring judge sat was not an 'independent and impartial tribunal established by law' within the meaning of Article 6 ECHR. However, whilst that judgment would have constituted a good and sufficient basis for rebutting the presumption of admissibility, it only became final on 3 May 2022, i.e. after the Court of Justice delivered its judgment in *Getin Noble Bank*, i.e. on 29 March 2022.

¹¹⁶ See *Getin Noble Bank*, EU:C:2022:235, ¶ 74.

¹¹⁷ See, e.g., *Elchinov*, Case C-173/09, EU:C:2010:581, ¶ 26, and *XC and Others*, Case C-234/17, EU:C:2018:853, ¶ 42 and the case law cited.

¹¹⁸ See *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, ¶ 59.

¹¹⁹ Opinion of Advocate General Tanchev in *Commission v. Poland (Disciplinary Regime for Judges)*, EU:C:2021:366, ¶ 132.

In *IS (Illegality of the order for reference)*, the Court of Justice confirmed that line of case law. First, citing its seminal *van Gend & Loos* judgment, the Court of Justice recalled that, as regards the preliminary reference mechanism, ‘the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258 and 259 TFEU] to the diligence of the Commission and the Member States’.¹²⁰ Limitations on the exercise by national courts of the jurisdiction conferred on them by Article 267 TFEU would have the effect of restricting the effective judicial protection of the rights which individuals derive from EU law.¹²¹ Second, it referred explicitly to its previous judgment in *Miasto Łowicz*, holding that judges may not be exposed to disciplinary proceedings or measures for having exercised their discretion to make a reference for a preliminary ruling to the Court.

Subsequently, the Court of Justice developed that line of case law further in *RS (Effects of the decisions of a constitutional court)*, this time in respect of national constitutional courts. It held that Article 267 TFEU, among other Treaty provisions, prohibits ‘national rules or a national practice under which 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’.¹²² The Court of Justice reasoned that those national rules or that practice would prevent the ordinary court called upon to ensure the application of EU law from itself assessing whether the legislative provisions at issue are compatible with EU law. Since in the context of that assessment, a national court may or, as the case may be, must engage in a dialogue with the Court of Justice, the national rules and practice at issue undermined the effectiveness of Article 267 TFEU. In addition, the Court of Justice found that that Treaty provision precludes disciplinary proceedings from being brought against a judge who sets aside a judgment of the constitutional court of a Member State by which that court refused to give effect to a preliminary ruling from the Court of Justice.¹²³

Moreover, in *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)*, the Court of Justice pointed out that Article 267 TFEU does not oppose national laws that change the organisation of national courts and in so doing, repeal the legal basis on which the referring court exercises its jurisdiction. However, those changes may not produce the *specific* effects of preventing national courts from maintaining requests for a preliminary ruling that have already been made, and from repeating similar requests in the future.¹²⁴ In other words, those changes may not ‘shut the door’ to an ongoing dialogue between the Court of Justice and national courts, and ‘lock that door’ forever in relation to new similar cases.

¹²⁰ *Van Gend & Loos*, Case 26/62, EU:C:1963:1, p. 13.

¹²¹ *IS (Illegality of the order for reference)*, EU:C:2021:949, ¶ 76.

¹²² *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 78.

¹²³ *Id.* ¶ 88.

¹²⁴ See *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶¶ 95 and 106.

3. Mutual trust and national courts

The EU has clearly evolved beyond the internal market paradigm. Currently, it seeks to offer its citizens an AFSJ without internal frontiers, where citizens may move freely and securely. In an area without internal frontiers, the exercise of free movement should not undermine the jurisdiction of the competent national court and the effectiveness of the applicable national laws, which operate on a territorial basis. As internal frontiers disappear in Europe, the *long arm of the law* should acquire a transnational dimension, so that, for example, criminals are prevented from relying on free movement as a means of pursuing their activities with impunity. Accordingly, the authors of the EU Treaties took the view that the free movement of persons should be accompanied by the free movement of judicial decisions. By virtue of the principle of mutual recognition, judicial decisions adopted in the Member State of origin are to be recognised and enforced in the other Member States as if they were their own.

The European Arrest Warrant mechanism (the ‘EAW mechanism’) illustrates this point.¹²⁵ This mechanism aims to replace the multilateral system of extradition between Member States with a simplified and more effective system of surrender between judicial authorities which facilitates and accelerates judicial cooperation.¹²⁶ In that regard, the Court of Justice has held that ‘while execution of the [EAW] constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly’.¹²⁷

It follows that, in order to establish an AFSJ, judicial cooperation in civil and criminal matters must be facilitated to the greatest extent possible. Such cooperation is based on the fundamental premise that Member State courts trust each other and see each other as equals. Thus, in the light of the principle of mutual trust, ‘each of [the Member] States, save in exceptional circumstances, [is] to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law’.¹²⁸ This shows that, whilst the principle of mutual trust is of paramount importance for the creation and maintenance of the AFSJ, ‘mutual trust is not to be confused with blind trust’.¹²⁹ In exceptional circumstances, that fundamental premise may be set aside.

¹²⁵ See Council Framework Decision 2002/584, On the European arrest warrant and the surrender procedures between Member States, 2002 O.J. (L 190) 1 (JHA), amended by Council Framework Decision 2009/299 amending Framework Decisions 2002/584, 2005/214, 2006/783, 2008/909 and 2008/947, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 O.J. (L 81) 24 (JHA).

¹²⁶ See, eg, F, Case C-168/13 PPU, EU:C:2013:358, ¶ 57; Lanigan, Case C-237/15 PPU, EU:C:2015:474, ¶ 27; Aranyosi and Căldăraru, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198, ¶ 76; Poltorak, Case C-452/16 PPU, EU:C:2016:858, ¶ 15; and *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, ¶ 25.

¹²⁷ See, eg, *Tupikas*, Case C-270/17 PPU, EU:C:2017:628 ¶ 50.

¹²⁸ Opinion 2/13 (Accession of the European Union to the ECHR) EU:C:2014:2454, ¶ 192. See also Puig Gordi and Others, Case C-158/21, EU:C:2023:57, ¶ 93.

¹²⁹ See Koen Lenaerts, *La vie après l’avis: Exploring the Principle of Mutual (Yet Not Blind) Trust* 54 COMMON MARKET LAW REVIEW 805, 821 (2017).

As to the principles of mutual trust and judicial independence, two lines of case law are relevant for present purposes, both of which concern the European Arrest Warrant Framework Decision (the ‘EAW Framework Decision’).

a. Judicial independence and mutual trust

As to the first line of case law, in *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, the Court of Justice held that the executing judicial authority must refuse to execute an EAW where there is ‘a real risk that the person [concerned] will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal’.¹³⁰ Therefore, the existence of such a real risk constitutes an ‘exceptional circumstance’ that limits the operation of the principles of mutual trust and mutual recognition.

In assessing the existence of that risk, the Court of Justice pointed out that the referring court must carry out a two-step examination.¹³¹ The first step focuses on the situation of the justice system of the Member State concerned as a whole.¹³² The executing judicial authority must, in the light of objective, reliable, specific and properly updated material, find that there is such a real risk on account of systemic or generalised deficiencies in the justice system of the issuing Member State. As a second step, the executing judicial authority must assess the circumstances of the case at hand. Having regard to the personal circumstances of the individual concerned, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis for the EAW, the executing judicial authority must determine whether the systemic or generalised deficiencies in the justice system of the issuing Member State are liable to call into question the independence of the court that actually issued the EAW in question.¹³³

Again, one of the reasons for this two-step examination rests on structural considerations.¹³⁴ If the executing judicial authorities were entitled to refuse to execute an EAW on the sole account of systemic or generalised deficiencies in the justice system of the issuing Member State, such refusal would amount to a *de facto* suspension of the EAW mechanism for that Member State. However, the prerogatives to declare such a suspension are vested in the Council acting upon a decision of the European Council grounded in Article 7 TEU, according to which the issuing Member State has committed a serious and persistent breach of the rule of law. Whilst most scholars agree that Article 7 TEU is not an effective tool that prevents the rule of law from backsliding in the issuing Member State, the truth is that it would be wrong for the Court of Justice to change the rules of the game. Article 7 TEU is what it is and it is not for the Court of Justice but for the Member States – acting as Masters of the Treaties – to change it. Moreover, those structural

¹³⁰ *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586. ¶ 59.

¹³¹ Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 336 et seq. See also *Puig Gordi and Others*, EU:C:2023:57, ¶ 97.

¹³² *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586. ¶ 61.

¹³³ *Id.*, ¶¶ 74 to 77. See *infra* footnotes 154 to 156 and accompanying text.

¹³⁴ The Court of Justice has also grounded the two-step assessment in the need to fight impunity. See *Openbaar Ministerie (Independence of the issuing judicial authority)*, EU:C:2020:1033, ¶¶ 62 – 63.

considerations are also consistent with the findings of the Court of Justice in the *Conditionality Judgments*. In those two cases, it held that the EU legislature may establish procedures that seek to protect the values contained in Article 2 TEU, ‘provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU’.¹³⁵ However, such a *de facto* suspension of the EAW mechanism would be incompatible with Article 7 TEU, as it would create ‘a procedure parallel to that laid down by that provision’.¹³⁶

Subsequently, the Court of Justice has put forward two additional justifications for the application of the two-step examination, despite calls from referring courts to limit their assessment to finding systemic or generalised deficiencies.¹³⁷ First, in *Openbaar Ministerie (Independence of the issuing judicial authority)*, the Court recalled that the EAW mechanism seeks to combat the impunity of a requested person who is present in a territory other than that in which he or she has allegedly committed an offence. In its view, if the second step were to be abandoned, this would allow those persons to go free, ‘even if there is no evidence, relating to the personal situation of those individuals, to suggest that they would run a real risk of breach of their fundamental right to a fair trial’ if the EAW is executed.¹³⁸ Second, in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, the Court of Justice added that the EAW framework decision had to be interpreted not only in the light of the rights of the person concerned by the EAW but also in light of those ‘of the victims of the offences concerned’. This means that a finding that the person concerned faces a real risk of breach of his or her fundamental right to a fair trial must have ‘a sufficient factual basis’.¹³⁹

Furthermore, in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, the referring court asked, in essence, whether the two-step examination was also applicable where the fundamental right to ‘a tribunal previously established by law’ is at issue. To that end, it drew the attention of the Court of Justice to the fact that in the issuing Member State, the KRS – a body that proposes to the President of Poland the name of candidates for judicial office – was

¹³⁵ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 168, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 207.

¹³⁶ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 167, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 206.

¹³⁷ In that regard, some scholars have also criticized the need for a concrete examination (the second step). See, in this regard, LAURENT PECH & DIMITRY KOCHENOV, RESPECT FOR THE RULE OF LAW IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 165 et seq (2021), who observe that ‘[it] is just not good enough to force the surrender of suspects to a country on the ground that one can still potentially secure a fair trial on a few scattered islands of independence in an ocean increasingly polluted by authoritarianism’. However, see Koen Lenaerts & José A. Gutiérrez-Fons, *The Court of Justice of the European Union and Fundamental Rights in the field of criminal law*, in RESEARCH HANDBOOK ON EU CRIMINAL LAW, 2ND ED (Maria Bergström, Teresa Quintel & Valsamis Mitsilegas eds, *forthcoming*), who argue that ‘the two-step examination protects judges who strive to act independently despite having to operate in a justice system that is subjected to constant attacks from the legislature and/or the executive. Those judges cannot be left to stand alone, since they have proven their loyalty to the rule of law and their trustworthiness. Metaphorically speaking, we believe that the two-step examination enables the executing judicial authorities to “separate the wheat from the chaff” on a case-by-case basis’.

¹³⁸ *Openbaar Ministerie (Independence of the issuing judicial authority)*, EU:C:2020:1033, ¶¶ 62 – 63.

¹³⁹ *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* EU:C:2022:100, ¶¶ 60 and 61. See also *Puig Gordi and Others*, EU:C:2023:57, ¶ 118.

no longer independent. This was because, following the adoption of a new law reforming it, the KRS is, for the most part, made up of members chosen by the legislature. If the KRS proposed the appointment of one or more of the judges who had imposed the custodial sentence or detention order in the issuing Member State, the referring court reasoned that this could give rise to doubts as to whether those judges were members of ‘a tribunal previously established by law’. The same doubts could also arise in relation to the judges who would conduct criminal proceedings following the execution an EAW.

At the outset, the Court of Justice confirmed the application of the two-step examination, highlighting ‘the inextricable links which... exist, for the purposes of the fundamental right to a fair trial, within the meaning of [Article 47 of the Charter], between the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law’.¹⁴⁰ In particular, regarding the judicial appointment procedure, those links exist because that procedure constitutes an inherent element of the concept of a ‘tribunal previously established by law’, whilst also being a factor by which the independence of the judges appointed ‘may be measured’.¹⁴¹

As to the first step, drawing on its case law on the rule of law, the Court of Justice held that not every irregularity in the judicial appointment procedure constitutes a breach of the fundamental right to ‘a tribunal previously established by law’, but only those ‘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 undermine the integrity of the outcome of the appointment procedure’.¹⁴² Finding such a breach requires ‘an overall assessment of a number of factors which, taken together, serve to create in the minds of individuals reasonable doubt as to the independence and impartiality of the judges’.¹⁴³ This meant, for present purposes, that the fact that a judge is appointed on a proposal from the KRS is not sufficient in itself to call into question his or her independence, nor to refuse to execute the EAW in question. That overall assessment is to be carried out on the basis of objective, reliable, specific and properly updated information, which may be obtained from the case law of the courts in the issuing Member State, of the Court of Justice and of the European Court of Human Rights (the ‘ECtHR’). The requirement of an overall assessment fits well with the need to establish systemic or generalised deficiencies in the justice system of the issuing Member State. Indeed, it is only by carrying out an overall assessment that one may identify those deficiencies.¹⁴⁴

As to the second step, it is for the executing judicial authority to examine whether the systemic and generalised deficiencies found are likely to materialise if the person concerned is surrendered to the issuing Member State. To that effect, the executing judicial authority must ‘[have] regard to that person’s personal situation, the nature of the offence for which he or she is prosecuted and the factual context in

¹⁴⁰ *Id.*, ¶ 56.

¹⁴¹ *Id.*, ¶ 57.

¹⁴² *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* EU:C:2022:100, ¶ 73

¹⁴³ *Id.*, ¶ 74.

¹⁴⁴ von Bogdandy, *supra* note 1, at 93-94.

which that arrest warrant was issued'.¹⁴⁵ It is for the person concerned to adduce specific evidence that those deficiencies had or are liable to have 'a tangible influence on the handling of his or her criminal case'. That evidence may, for example, relate to the secondment of a particular judge within the panel that imposed the custodial sentence that the EAW seeks to execute, where that secondment was made by the Minister for Justice on the basis of arbitrary criteria. Similarly, that evidence may also include statements made by public authorities which could have an influence on the specific case in question. That said, the Court of Justice again stressed the importance of judicial cooperation: if the person concerned puts forward evidence that is relevant but not sufficient to demonstrate the existence of a real risk of breach of his or her fundamental right to a tribunal previously established by law, the executing judicial authority is required to ask the issuing judicial authority to provide it with supplementary information. Failure to cooperate may be taken into account by the executing judicial authority for the purposes of establishing the existence of such a real risk.¹⁴⁶

b. The notion of 'judicial authority'

As to the second line of case law, in *Poltorak* and the cases that followed,¹⁴⁷ the Court of Justice has been called upon to interpret the notion of 'judicial authority' within the meaning of the EAW Framework Decision. In that regard, the Court of Justice has pointed out that that notion is broader than that of 'court or tribunal' within the meaning of EU law, since it may include other authorities involved in the administration of criminal justice, which are distinct from, *inter alia*, ministries or police services which are part of the executive.¹⁴⁸ Given that the EAW mechanism imposes limitations on the exercise of the fundamental rights of the persons concerned, in particular on the right to liberty, its proper functioning requires a high level of trust between the Member States. That high level of trust may only be provided by authorities that are independent from the legislature and the executive.¹⁴⁹ 'That independence requires that there are statutory rules and an

¹⁴⁵ *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* EU:C:2022:100, ¶ 53.

¹⁴⁶ *Id.*, ¶¶ 84 and 85.

¹⁴⁷ *Poltorak*, EU:C:2016:858. See also Özçelik, Case C-453/16 PPU, EU:C:2016:860; Kovalkovas, Case C-477/16 PPU, EU:C:2016:861; OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau), Case C-508/18, EU:C:2019:456; PF (Prosecutor General of Lithuania), Case C-509/18, EU:C:2019:457; Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours), Joined Cases C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077; Openbaar Ministerie (Swedish Public Prosecutor's Office), Case C-625/19 PPU, EU:C:2019:1078, and Openbaar Ministerie (Public Prosecutor, Brussels), Case C-627/19 PPU, EU:C:2019:1079. For an analysis of that line of case law, see K. Lenaerts, *On Judicial Independence and the Quest for National, Supranational and Transnational Justice*, in THE ART OF JUDICIAL REASONING. FESTSCHRIFT IN HONOUR OF CARL BAUDENBACHER 155, 170 et seq. (Gunnar Selvik, Michael-James Clifton, Theresa Haas, Luísa Lourenço, & Kerstin Schwiesow, eds).

¹⁴⁸ *Poltorak*, EU:C:2016:858, ¶¶ 33 and 35; *Kovalkovas*, EU:C:2016:861, ¶¶ 34 and 36; *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, ¶ 50, and *PF (Prosecutor General of Lithuania)*, EU:C:2019:457, ¶ 29.

¹⁴⁹ *Poltorak*, EU:C:2016:858, ¶ 35. However, textual, contextual and teleological differences between the EAW Framework Decision and other EU law instruments pertaining to the AFSJ may justify a different interpretation of the notion of 'judicial authority'. This is the case of that notion within the meaning of Parliament and Council Directive 2014/41, Regarding the European Investigation Order

institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive'.¹⁵⁰

For example, neither ministries nor police services which are part of the executive may be considered to be 'issuing judicial authorities'.¹⁵¹ Similarly, in *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, the Court of Justice found that the notion of 'issuing judicial authority' must be interpreted as not including public prosecutors' offices of Germany which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice of a Land, in connection with the adoption of a decision to issue [an EAW].¹⁵² By contrast, in the light of the applicable statutory rules and institutional framework, the Court of Justice found that Lithuanian, French, Swedish and Belgian public prosecutors' offices enjoy the status of 'judicial authority'.¹⁵³

c. When two lines of case law intersect

Logically, the question that arises is what happens when the *Poltorak* and *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)* lines of case law intersect. May the executing judicial authority deny the status of 'issuing judicial authority' to the courts belonging to the judicial system of the issuing Member State, where there is evidence of systemic or generalised deficiencies concerning the independence of the judiciary in that Member State? In *Openbaar Ministerie (Independence of the issuing judicial authority)*, the Court of Justice was confronted with that very question and replied in the negative.¹⁵⁴ It found that denying such status would extend the limitations on the operation of the principles of mutual trust and mutual recognition beyond 'exceptional circumstances', within the meaning of its case law, since such denial would lead to a general exclusion of those principles in respect of all judges or all courts of the issuing Member State. Moreover, those systemic or generalised deficiencies do not necessarily affect every decision that the courts of the issuing Member State may adopt in a particular case. Most importantly, the criteria developed in the *Poltorak* line of case law with respect to the public

('EIO') in criminal matters, 2014 O.J. (L 130) 1 (EU). See, in this regard, *Staatsanwaltschaft Wien (Falsified transfer orders)*, Case C-584/19, EU:C:2020:1002. Moreover, another distinguishing factor to be taken into account is whether there are limitations on the right to liberty. In that regard, the Court of Justice pointed out that 'except in the specific case of the temporary transfer of persons already held in custody for the purpose of carrying out an investigative measure ..., the [EIO], unlike [an EAW], is not such as to interfere with the right to liberty of the person concerned, enshrined in Article 6 of the Charter.' See, *id.*, ¶ 73.

¹⁵⁰ *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, ¶ 74, and *Prosecutor General of Lithuania*, C-509/18, EU:C:2019:457, ¶ 52.

¹⁵¹ *Poltorak*, EU: C:2016:858, and *Kovalkovas*, EU: C:2016:861.

¹⁵² *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, ¶ 90. However, those same authorities would be considered to be 'judicial authorities' for the purposes of issuing an EIO. See, in this regard, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, ¶ 74.

¹⁵³ *PF (Prosecutor General of Lithuania)*, C-509/18, EU: C:2019:457, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, EU:C:2019:1077; *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, EU:C:2019:1078, and *Openbaar Ministerie (Public Prosecutor, Brussels)*, EU: C:2019:1079.

¹⁵⁴ *Openbaar Ministerie (Independence of the issuing judicial authority)*, EU:C:2020:1033.

prosecutor's offices do not apply *mutatis mutandis* to courts, within the meaning of EU law. The reason is twofold. First, with regard to the public prosecutor's offices, the requirement of independence looks at the applicable statutory rules and institutional framework, and not at the existence or absence of systemic or generalised deficiencies. Second, since courts, within the meaning of EU law, are required to be independent, they are not subordinated to the executive. Accordingly, an executing judicial authority may not deprive those courts of their status of 'issuing judicial authorities', even if their independence is being threatened by those deficiencies. That does not mean, however, that the right to a fair trial of the person concerned is left unprotected, since the executing judicial authority may still refuse to execute the EAW by applying the two-step examination set out in *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*.

To some extent, the rationale underpinning the findings of the Court of Justice in *Getin Noble Bank* echo those in *Openbaar Ministerie (Independence of the issuing judicial authority)*. It follows from those two judgments that the notion of 'court or tribunal', within the meaning of Article 267 TFEU, and that of 'judicial authority', within the meaning of the EAW mechanism, apply, in principle, to national courts, even if the Member State in question suffers from systemic deficiencies in its justice system. There is a presumption of compliance, which may, however, be rebutted. Moreover, that presumption only opens the door respectively to judicial dialogue and to the application of the EAW mechanism.

Indeed, that presumption only applies to the admissibility of the reference under Article 267 TFEU, but says nothing as to whether the referring court respects the right of the parties in the main proceedings to an independent tribunal.

Similarly, that presumption says nothing as to whether the EAW in question must be executed. To that end, in *Openbaar Ministerie (Independence of the issuing judicial authority)*, the Court of Justice confirmed the two-step examination, drawing, nonetheless, a distinction between EAWs issued for the purpose of conducting a criminal prosecution and those issued for the purpose of executing a custodial sentence or detention order, both types being at issue in that case. In relation to the former type, the executing judicial authorities must take into account whether the systemic or generalised deficiencies – including those arising after the issue of the EAW – may adversely affect the trial to be held in the issuing Member State.¹⁵⁵ In relation to the latter type, the executing judicial authority should focus solely on whether those deficiencies – at the time of the issue of the EAW – affected the independence of the court that imposed the custodial sentence or detention order.¹⁵⁶

It is worth mentioning that both referring courts in *LM* and in *Openbaar Ministerie (Independence of the issuing judicial authority)* – respectively the High Court of Ireland and the District Court of Amsterdam – applied that two-step examination, reaching, however, different outcomes in relation to the EAWs issued by the Polish judicial authorities for the purpose of conducting a criminal

¹⁵⁵ *Id.*, ¶ 66.

¹⁵⁶ *Id.*, ¶ 68.

prosecution. Whilst the High Court decided to execute the EAW,¹⁵⁷ the District Court of Amsterdam refused to do so.¹⁵⁸ By contrast, in relation to the EAW issued for the purpose of executing a custodial sentence at issue in *Openbaar Ministerie (Independence of the issuing judicial authority)*, the District Court of Amsterdam decided to execute it.¹⁵⁹

II. THE RULE OF LAW WITHIN THE EU AS A FRAMEWORK OF REFERENCE

A. *EU membership as a starting point and the prohibition of value regression*

As mentioned above, the rule of law within the EU allows room for diversity in the Member States. The latter are free to choose their own constitutional arrangements as they see fit, provided that those arrangements secure compliance with the values on which the EU is founded. As the Court of Justice has held in respect of national measures that adversely affect judicial independence, ‘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’.¹⁶⁰

Understanding the rule of law as a framework may explain why before joining the EU, a candidate Member State must align its own constitution (or Basic law) – including institutional and substantive provisions – with the values on which the EU is founded. The so-called Copenhagen Criteria implied, *inter alia*, a strict control of those values. The decision to align its own constitutional arrangements with EU

¹⁵⁷ Following the ruling of the Court of Justice in *LM*, the High Court of Ireland decided to execute the warrants at issue. It reasoned that “although recent reforms had brought about systemic deficiencies in the Polish justice system, there [was] no evidence showing that any other aspect of the fair trial right — such as the right to know the nature of the charge, the right to counsel, the right to challenge evidence and the right to present evidence — [was] at risk in Poland”. *The Minister for Justice and Equality v. Celmer*. No 5 [2018] IEHC 639, ¶ 103. Subsequently, that ruling was upheld by the Irish Supreme Court in *Minister for Justice & Equality v. Celmer* [2019] IESC 80.

¹⁵⁸ The District Court of Amsterdam found that Polish laws reforming the judicial system had had a ‘chilling effect’ on the members of the judiciary, who now feared being sanctioned in the event of adopting a decision running against the interests of the executive. As to the case at hand, the District Court observed that two Polish judges, who sit in the court having jurisdiction for the trial of the person concerned by the EAW at issue, had been the subject of disciplinary proceedings before the Disciplinary Chamber of the Supreme Court. The District Court called into question the independence and impartiality of that Chamber. Moreover, it pointed out that the case at hand had attracted the attention of the media, and that the Polish Public Prosecutor’s office had given instructions to scrutinise the EAWs issued by Dutch judicial authorities in order to find grounds for mandatory non-execution. In the light of the foregoing considerations, the District Court decided not to execute the EAW at issue in Case C-345/20 PPU. See *Rechtbank Amsterdam*, order of 10 February 2021, ECLI:NL:RBAMS:2021:420.

¹⁵⁹ The District Court found that the systemic deficiencies in the Polish justice system had not adversely affected the independence of the Polish court that imposed the custodial sentence and accordingly, did not call into question the right to a fair trial of the person concerned. See *Rechtbank Amsterdam*, order of 27 January 2021, ECLI:NL:RBAMS:2021:179.

¹⁶⁰ *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 52 and the case law cited, and *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, ¶ 36 and the case law cited.

values is a sovereign choice of the candidate Member State.¹⁶¹ However, if such a State fails to do so, Article 49 TEU bars it from becoming a member of the EU.¹⁶²

Becoming a Member State is, therefore, a ‘constitutional moment’ for the State concerned since at that very moment, the legal order of the new Member State is deemed by the ‘Masters of the Treaties’ to uphold the values on which the EU is founded. The judgment of the Court of Justice in *Getin Noble Bank* illustrates this point. In that case, the Court ruled that the fact that the Polish judge in question was firstly appointed during the regime established by the Polish People’s Republic (the ‘PPR’) was not sufficient in itself to call into question his independence. When that undemocratic regime ended, the democratic constitutional order that followed it accepted that judges who were appointed by bodies of the PPR could, in principle, remain in office. Those judges were part of the judicial system in force at the time when Poland acceded to the EU. Since accession can only take place in compliance with the so-called Copenhagen criteria and Article 49 TEU, the Court of Justice reasoned that ‘at the time the Republic of Poland acceded to the EU, it was considered that, in principle, the judicial system was compatible with EU law’.¹⁶³ In the absence of any concrete and clear explanation to the contrary, the Court of Justice found that the appointment of a judge during the PPR regime was not ‘such as to give rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge in the exercise of his or her judicial functions’.¹⁶⁴

From the moment of accession onwards, interlocking the legal order of the *new* Member State with the EU legal order and the other Member States’ legal orders takes place. The Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is ‘no turning back the clock’ when it comes to respecting the values contained in Article 2 TEU. This was made clear by the Court of Justice in the *Conditionality Judgments*, ruling that ‘[c]ompliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession’.¹⁶⁵ The Member States must respect them ‘at all times’.¹⁶⁶

The level of value protection provided for by a Member State when it joined the EU is a starting point and the trend of constitutional reforms must always be towards strengthening that protection. As the Court of Justice held in *Repubblika*, ‘[a] Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given

¹⁶¹ The same applies where a Member State decides to withdraw from the EU. See Wightman and Others, Case C-621/18, EU:C:2018:999, ¶ 50.

¹⁶² That provision states that ‘[a]ny 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.’ (Emphasis added). *Repubblika*, EU:C:2021:311, ¶ 61.

¹⁶³ *Getin Noble Bank*, EU:C:2022:235, ¶ 104.

¹⁶⁴ *Id.*, ¶ 105.

¹⁶⁵ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 126, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 144.

¹⁶⁶ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 234, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 266.

concrete expression by, inter alia, Article 19 TEU'.¹⁶⁷ It follows from that judgment that the EU legal order prohibits 'value regression'. Authoritarian drifts have simply no room in the EU legal order, since they would call into question the effectiveness of Articles 2, 19(1) and 49 TEU.

The prohibition of value regression is highlighted by contrasting the judgments of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)*, with that in *Repubblika*. In those cases, the Court of Justice held that the principle of judicial independence does not prevent the executive from appointing judges, provided that 'once appointed, they are free from influence or pressure when carrying out their role'.¹⁶⁸ That proviso means, in essence, that the substantive conditions and procedural rules governing the adoption of those appointment decisions must not give rise to reasonable doubts as to the internal and external independence of those judges.¹⁶⁹ Those doubts arise where the reforms at issue bring about a regression of the rule of law. This may occur where the constitutional body in charge of evaluating the suitability of candidates for judicial office is no longer independent. In *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)*, that appears to be the case since the reforms at issue sought – subject to confirmation by the referring courts – to undermine the independence of the Polish National Judicial Council (the 'KRS'), which, as the constitutional body entrusted with protecting judicial independence, submits proposals for appointment to judicial positions to the Polish President.¹⁷⁰ Following the judgment of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the referring court found that the KRS was not an independent body.¹⁷¹ When compared with the appointment process in force at the time Poland acceded to the EU in 2004, the reforms at issue – which were passed in 2017 and 2018 – were a step backward.

By contrast, in *Repubblika*, the reforms in question had actually strengthened the guarantee of judicial independence.¹⁷² They established a body, the Judicial Appointments Committee, that gave advice to the Prime Minister about the eligibility and merit of the candidates for appointment to judicial positions. Since the

¹⁶⁷ *Repubblika*, EU:C:2021:311, ¶ 63.

¹⁶⁸ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 133; *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 122, and *Repubblika*, EU:C:2021:311, ¶ 56.

¹⁶⁹ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶¶ 134 and 135; *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 123, and *Repubblika*, EU:C:2021:311, ¶ 57.

¹⁷⁰ The Court of Justice drew the attention of the referring court to a series of elements on the basis of which it could carry out its assessment as to whether the KRS was independent. Notably, it had to examine the fact that the law reforming the KRS had shortened the mandate of incumbent members, that 22 out of 25 members of the KRS were directly elected by the *Sejm* (the Lower House of the Polish Parliament); that some of the new members of the KRS had, according to the referring court, been appointed in spite of significant irregularities, and the way in which the KRS exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers.

¹⁷¹ Polish Supreme Court, judgment of 5 December 2019. For a summary of that judgment, see order of 8 April 2020, *Commission v. Poland*, Case C-791/19 R, EU:C:2020:277, ¶ 19.

¹⁷² *Repubblika*, EU:C:2021:311, ¶ 69.

independence of that body was not questioned by the referring court, it contributed to objectivising the appointment process to judicial positions. When compared with the appointment process in force at the time Malta acceded to the EU in 2004, the reforms at issue – which were passed in 2016 – were a step forward.

Moreover, that ongoing and reciprocal commitment to upholding the values on which the EU is founded is precisely what may distinguish a ‘Member State’ from a ‘third country’. Since the Member States share and cherish the same values, they trust each other and may, on the basis of that mutual trust, create an area without internal frontiers where citizens may move freely and securely.¹⁷³ By contrast, the principle of mutual trust is not applicable to third countries.¹⁷⁴ Seen in this light, EU membership implies, first and foremost, entering into a ‘Union of values’.

That said, value alignment must *not* be confused with constitutional modelling.¹⁷⁵ As the Court of Justice made clear in *Euro Box Promotion and Others* and in *RS*, the rule of law within the EU does not seek to impose ‘a particular constitutional model’ to which all Member States must aspire.¹⁷⁶ Imposing such a model would be contrary to the principle of national identity enshrined in Article 4(2) TEU, which expressly states that the EU shall respect the identities of the Member States, ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. Instead, as the Court of Justice pointed out in the *Conditionality Judgments*, ‘[the Member] States enjoy a certain degree of discretion in implementing the principles of the rule of law’.¹⁷⁷ However, the obligation to implement those principles ‘as to the result to be achieved may [not] vary from one Member State to another’.¹⁷⁸ This is because the Member States share a common understanding of the rule of law despite having ‘separate national identities’ which the EU respects.¹⁷⁹

It follows from the case law of the Court of Justice that EU law provides for a framework within which the Member States may make their own constitutional

¹⁷³ *Id.*, ¶ 62. Iris Canor, *Suspending Horizontal Solange: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law*, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES, *supra* note 1, 183, at 189.

¹⁷⁴ Opinion 1/17 (EU-Canada CET Agreement), EU:C:2019:341, ¶ 129 (holding that ‘[the] principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State’). That said, whilst mutual trust cannot be presumed in the relations with third countries, the latter may gain that trust by building a special relationship with the EU and by being equally committed to the values on which the EU is founded. See I.N., Case C-897/19 PPU, EU:C:2020:262, ¶¶ 44 and 77. See, in this regard, Koen Lenaerts, José A. Gutiérrez-Fons and Stanislas Adam, *Exploring the Autonomy of the European Union Legal Order*, 81 ZAÖRV/HJIL 47 (2021).

¹⁷⁵ See, in this regard, Opinion of Advocate General Bobek in *Statul Român – Ministerul Finanțelor Publice*, Case, C-397/19, EU:C:2020:747, ¶¶ 100 and 101.

¹⁷⁶ *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 43, and *Euro Box Promotion and Others*, EU:C:2021:1034, ¶ 229 and the case-law cited.

¹⁷⁷ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 233, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 265.

¹⁷⁸ *Id.*

¹⁷⁹ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 234, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 266.

choices.¹⁸⁰ Those choices may vary from one Member State to another, but no choice must give rise to authoritarian tendencies that would call into question the values contained in Article 2 TEU.¹⁸¹ On the contrary, those choices must, first, be sufficient in themselves to guarantee compliance with those values and, second, not constitute a regression. Subject to those two limitations, a Member State may organise its own system of checks and balances as it wishes.

Arguments that consider that framework as being ‘ultra vires’ are ill founded, since without that framework, the EU cannot operate. The EU’s constitutional structure would collapse in the absence of a rule of law based on common values. Value alignment and the prohibition of value regression are two essential conditions for a Member State to participate in that structure.¹⁸²

B. *Building the framework*

Logically, the question that arises is how the Court of Justice – as the ultimate interpreter of the Treaties – is to build such a framework.¹⁸³ In my view, a close reading of the case law reveals that the rule of law within the EU is not the result of a ‘top-down’ approach. It is rather a ‘bottom-up’ construction that seeks to reinforce the ongoing commitment of the Member States towards the values on which the EU is founded. The essence of the rule of law draws inspiration from the Europeans’ common struggle to find liberty, democracy and justice by fighting the tyranny of those who want to remain in power at all costs. That is why the rule of law within the EU is grounded in the constitutional traditions common to the Member States.¹⁸⁴ By upholding the rule of law, the Court of Justice is also making sure that the Member States remain loyal to their own common traditions. As the Court of Justice held in *Repubblika*, the prohibition of value regression implies that authoritarian tendencies can never form part of the EU’s common constitutional space. They will never become part of the constitutional traditions common to the Member States. In order to identify those traditions, the Court of Justice will embark on a comparative law study that would obviously exclude those tendencies.

For example, in *Ax v. Statul Român*, A.G. Bobek argued that, where a Member State has been found liable for damages caused by judicial error, the principle of judicial independence as enshrined in Article 19(1) TEU does not preclude, *per se*, the possibility for such a Member State to initiate subsequently a recovery action for

¹⁸⁰ Prechal, *supra* note 31, at 187 (pointing out that ‘[an] issue like the independence of the judiciary operates in a specific institutional, political, legal and cultural context. What is unacceptable in one system may seem rather normal in another. There should certainly not be “one-size fits all solutions”; space should be left to the Member States to make their choices’).

¹⁸¹ von Bogdandy, *supra* note 1, at 91 (observing that the values contained in Article 2 TEU ‘do not constitute “laws of construction”, but rather “red lines”’).

¹⁸² *Repubblika*, EU:C:2021:311, ¶ 63; compare Opinion of Advocate General Tanchev in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2020:1053, ¶ 83.

¹⁸³ *Republic of Moldova*, EU:C:2021:655, ¶ 45, and *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 52.

¹⁸⁴ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 237, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 291 (holding that ‘[the] principles of the rule of law, as developed in the case-law of the Court on the basis of the EU Treaties, are thus recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems’).

civil liability against the judge concerned in cases of bad faith or gross negligence on the part of that judge. In putting forward that argument, AG Bobek relied on comparative law. He noted that, with the exception of Member States belonging to the common law tradition, ‘State liability for damages caused by the judiciary is widely accepted’.¹⁸⁵ Where such liability is accepted, several Member States – albeit not all of them – enable the State to recover the sums paid from the judge concerned. However, those Member States do not follow the same approach as to the way of recovering the sums paid. ‘These divergences show that the balance between accountability and judicial independence is understood rather differently in various jurisdictions, depending on judicial traditions and constitutional conceptions concerning the principle of the separation of powers and the different arrangements of checks and balances between those powers’.¹⁸⁶ He rightly observed that it was not for EU law to strike that right balance by imposing a specific regime of liability. Instead, EU law must limit itself to circumscribing the choices made by the Member State concerned so that the model of civil liability of judges chosen by that Member State ensures that ‘judges are protected against pressure liable to impair their independence of judgment and to influence their decisions’.¹⁸⁷ On this point, the Court of Justice followed the Opinion of the Advocate General. It held that whether the State may bring a recovery action for civil liability against the judge concerned is a question that pertains to the organisation of justice and as such, falls within the competences of the Member States.¹⁸⁸ That said, where national law recognises a principle of personal liability of judges for judicial errors, that law must comply with the principle of judicial independence as defined by EU law, meaning that such recognition must not ‘influence the decision-making of those having the task of adjudicating’.¹⁸⁹ In particular, the liability of the judge concerned for judicial error must be limited to exceptional cases. ‘[The] fact that a decision contains a judicial error’, the Court of Justice wrote, ‘cannot, in itself, suffice to render the judge concerned personally liable’.¹⁹⁰ That liability must also be based on objective and verifiable criteria, seek to guarantee the good administration of justice, and prevent any risk of external pressure that might unduly influence the content of judicial decisions. Moreover, the rights of the defence and to effective judicial protection of the judge concerned must be protected.¹⁹¹

In the same way, given that both the EU legal order and the system established by the European Convention on Human Rights (the ‘ECHR’) are based on a set of common values, the rule of law within the EU draws inspiration from the ECHR, as interpreted by the ECtHR. In turn, the case law of the Court of Justice on the rule of law has positively influenced the case law of the ECtHR, showing that both legal

¹⁸⁵ Opinion of Advocate General Bobek in *Statul Român – Ministerul Finanțelor Publice*, EU:C:2020:747, ¶ 96.

¹⁸⁶ *Id.*, ¶ 97.

¹⁸⁷ *Id.*, ¶ 101.

¹⁸⁸ See *Asociația “Forumul Judecătorilor din România” and Others.*; EU:C:2021:393, ¶ 229.

¹⁸⁹ *Id.*, ¶ 232.

¹⁹⁰ *Id.*, ¶ 234.

¹⁹¹ *Id.*, ¶ 237.

systems are, as former President Spano put it, in ‘a symbiotic relationship’ when it comes to strengthening the rule of law in Europe.¹⁹²

The principle of judicial independence illustrates this point. In *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the Court of Justice held that the principle of judicial independence within the meaning of EU law provides a level of protection at least equivalent to that guaranteed by the ECHR.¹⁹³ It therefore referred extensively to the case law of the ECtHR when making its findings.¹⁹⁴ Similarly, when examining the right to an independent and impartial tribunal previously established by law enshrined in Article 47 of the Charter, in *Simpson v. Council and HG v. Commission*, the Court of Justice referred to the findings of the ECtHR in *Guðmundur Andri Ástráðsson v. Iceland*.¹⁹⁵

For its part, the ECtHR has referred to the judgment of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and to that in *Commission v. Poland (Independence of the Supreme Court)* when interpreting the principle of irremovability of judges.¹⁹⁶ More recently, referring again to those two judgments, the ECtHR held in *Reczkowicz v. Poland* that the procedure for the appointment of the members of the Disciplinary Chamber of the Polish Supreme Court was unduly influenced by the legislature and the executive, which is per se incompatible with Article 6(1) ECHR.¹⁹⁷ Subsequently, in *Getin Noble Bank*, the Court of Justice referred to that judgment of the ECtHR, thereby highlighting the convergence between the two courts.¹⁹⁸

Most importantly for present purposes, both courts seem to share the same understanding of the rule of law within their respective legal systems as not prescribing a particular constitutional model but a framework of reference.¹⁹⁹

¹⁹² Robert Spano, *The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary*, EUROPEAN LAW JOURNAL 1, 13 (2021).

¹⁹³ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶¶ 117 and 118.

¹⁹⁴ *Id.*, ¶¶ 127 and 128. As to the notion of ‘independent tribunal’ within the meaning of Article 6 ECHR, the Court of Justice referred to *Ramos Nunes de Carvalho e Sá v. Portugal* [Grand Chamber], app. nos. 55391/13, 57728/13 and 74041/13, CE:ECHR:2018:1106JUD005539113, ¶ 144, and *Fruni v. Slovakia*, app. no. 8014/07, CE:ECHR:2011:0621JUD000801407, ¶ 141. As to the notion of impartiality within the meaning of Article 6 ECHR, it referred to *Kleyn and Others v. the Netherlands*, app. nos. 39343/98, 39651/98, 43147/98 and 46664/99, CE:ECHR:2003:0506JUD003934398, ¶ 191, and *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, ¶¶ 145, 147 and 149.

¹⁹⁵ See *supra* note 83.

¹⁹⁶ In particular, the ECtHR concurs with the Court of Justice in that ‘that principle is not absolute, although an exception to that principle would only be acceptable “if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it’’. See *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, ¶ 239 (quoting *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 139). See also *Xhoxhaj v. Albania*, app. no. 15227/19, CE:ECHR:2021:0209JUD001522719, ¶ 331.

¹⁹⁷ ECtHR, *Reczkowicz v. Poland*, app. no. 43447/19, CE:ECHR:2021:0722JUD004344719, ¶ 276.

¹⁹⁸ *Getin Noble Bank*, EU:C:2022:235, ¶ 128.

¹⁹⁹ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 130, where the Court of Justice noted that ‘neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply

C. *Law in context*

The rule of law within the EU allows room for diversity not only because it is normatively construed as a framework of reference, but also because the Court of Justice has embraced a ‘law in context’ approach. This idea is illustrated by the interpretation and application of the principle of judicial independence put forward by the Court of Justice. In order to determine whether that principle is called into question, the referring court, in cooperation with the Court of Justice (or just the latter in the context of infringement proceedings), must not only examine the laws at issue but also the relevant facts. As the Court of Justice has held, ‘the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it’.²⁰⁰

Whether those doubts are dispelled or not depends not only on the way in which those rules are drafted but also on the reasons behind their adoption and the manner in which they are enforced.²⁰¹ Put differently, the Court of Justice has taken the view that the principle of judicial independence requires to look at the ‘specific national legal and factual context’.²⁰² That is why the guarantee of judicial independence ‘preclude[s] not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned’.²⁰³ To some extent, that understanding of judicial independence echoes the case law of the ECtHR, according to which the relevant provisions of the ECHR protect not only ‘judicial independence *de jure*’ but also ‘judicial independence *de facto*’.²⁰⁴

This means, in essence, that a rule regarding, for example, the appointment of judges may be incompatible with the principle of judicial independence, as protected under EU law, in a specific legal and factual context. However, that same rule may not be so in a different legal and factual context.

with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of the ECHR have been met’. It referred to the following case law of the ECtHR: *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, ¶ 193 and the case law cited; *Sacilor Lormines v. France*, app. no. 65411/01, CE:ECHR:2006:1109JUD006541101, ¶ 59; and *Thiam v. France*, app. no. 80018/12, CE:ECHR:2018:1018JUD008001812, ¶ 62 and the case law cited.

²⁰⁰ *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, ¶ 66; *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 74; *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 123, and *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 117. See also *Wilson*, EU:C:2006:587, ¶ 53.

²⁰¹ Prechal, *supra* note 31, at 187 and 188.

²⁰² *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 129.

²⁰³ *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 119, and *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 125.

²⁰⁴ Spano, *supra* 192, at 8.

In *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, the Court of Justice made this point crystal clear, holding that ‘the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic’.²⁰⁵ It noted, however, that problems with the rule of law do arise ‘where the adoption of provisions undermining the effectiveness of judicial remedies of that kind which previously existed, ... considered together with other relevant factors characterising such an appointment process in a *specific national legal and factual context*, appear such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process’.²⁰⁶ In that case, which concerned the process of appointment of judges of the Polish Supreme Court, the Court of Justice drew the attention of the referring court to three relevant factors. First, the remedies set out by the new provisions at issue were illusory.²⁰⁷ Second, those provisions limited the intensity of judicial review regarding appointment to judicial positions in the Supreme Court, without doing so for other judicial positions. Those new provisions had thus the effect of ‘undermin[ing] the effectiveness of the judicial review provided for until then in the national legislation’.²⁰⁸ Third, those provisions were adopted in parallel with other reforms that were deemed problematic in terms of protecting the rule of law within the EU. Those reforms involved the lowering of the retirement age for judges of the Supreme Court,²⁰⁹ and the new composition and functioning of the KRS.²¹⁰

Moreover, when examining the relevant rules and the factual context in which they apply, the Court of Justice follows a combined assessment of all the relevant factors.²¹¹ Whilst one factor may not suffice in itself to call into question the principle of judicial independence, that factor taken together with others may cast doubt in the minds of individuals as to the imperviousness of the body at issue to external factors, and its neutrality with respect to the interests before it.²¹² In *Land Hessen*, for example, the referring court questioned the compatibility of the

²⁰⁵ *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 156.

²⁰⁶ *Id.* (emphasis added).

²⁰⁷ The new provisions governing the appointment process to the Polish Supreme Court provide that, unless all candidates who have been put forward for appointment by the KRS challenged the proposal – which would be against their own interests – , that proposal becomes final, even if it is challenged by all other candidates. As the referring court noted, because of the new provisions, ‘the part of [the] resolution [of the KRS] putting forward candidates for appointment will de facto always become final in that way’.

Id. ¶¶ 35 and 158.

²⁰⁸ *Id.* ¶ 60.

²⁰⁹ *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531.

²¹⁰ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.

²¹¹ See, e.g., *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶ 152, and *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931, ¶ 87. In those two judgments, the Court used the expression ‘taken together’ to stress the importance of carrying out an overall assessment.

²¹² *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 142. See also *Getin Noble Bank*, EU:C:2022:235, ¶ 126. Prechal rightly observes that the need for an overall assessment also holds true ‘the other way around’: ‘while certain rules or practices might be questionable from the perspective of independence when taken separately, they might, in the bigger picture, be outweighed by other factors in the system’. See *Effective Judicial Protection: some recent developments*, *supra* note 31, at 187.

composition of the Judicial Appointments Committee with the principle of independence, given that the majority of its members were chosen by the legislature of Land Hessen. However, the Court of Justice found that that circumstance alone did not suffice to question the independence of that body, nor that of the referring court.²¹³

By contrast, in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, in addition to pointing out that judges in Poland are appointed by the President, the referring court alluded to a series of factors that could cast doubt in the minds of individuals as to the independence of the newly established Disciplinary Chamber of the Supreme Court.²¹⁴ First, it described a series of elements that could call into question the independence of the KRS when it proposed candidates to sit in that Chamber.²¹⁵ Second, the jurisdiction of the Disciplinary Chamber had been established concomitantly with the provisions of the Law on the Supreme Court of 2017 that lowered the retirement age from 70 to 65 and forced the sitting judges who were already 65 years old – or older – to retire. Those provisions had already been declared incompatible with EU law in *Commission v. Poland (Independence of the Supreme Court)*.²¹⁶ Third and last, the Disciplinary Chamber was not composed of sitting judges but only of newly appointed judges, and that Chamber enjoyed a particularly high level of autonomy within the Supreme Court.²¹⁷

Furthermore, since the guarantee of judicial independence incorporates a combination of both legal and factual elements, it entails significant differences between the role that the Court of Justice plays in the context of the preliminary reference mechanism and that it plays in the context of infringement proceedings. As to the preliminary reference mechanism, the Court of Justice does not enjoy jurisdiction to establish the relevant facts, nor may it apply the relevant provisions of EU law to the case at hand. Those determinations are for the referring court to undertake, notwithstanding the fact that the Court of Justice may ‘provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions’.²¹⁸

Notably, the Court of Justice may identify the factors, as they result from the material in the case file, in light of which the referring court must carry out its overall assessment.²¹⁹ *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* is an excellent example in that regard. In that case, the Court of Justice was asked to determine whether Article 19(1) TEU was to be interpreted as precluding the Minister for Justice of a Member State, i.e. Poland, from seconding a judge to a

²¹³ *Land Hessen*, Case C-272/19, EU:C:2020:535, ¶¶ 55-56.

²¹⁴ A similar approach relating to the right to an independent and impartial tribunal previously established by law can be found in *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798.

²¹⁵ See to that effect, *supra* note 170.

²¹⁶ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 149.

²¹⁷ *Id.* ¶ 151.

²¹⁸ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 132.

²¹⁹ See also *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶¶ 131 to 133, and *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931, ¶ 74 and 75.

higher criminal court. After looking at the legal and factual context of the case, the Court of Justice identified four relevant factors that could give rise to doubts in the minds of individuals as to the imperviousness of the seconded judges and that of the panels on which they sat. First, the criteria applied by the Minister for Justice for the purposes of seconding judges and for those of terminating such secondments were not made public. Nor was the Minister for Justice required to state the reasons for terminating the secondment.²²⁰ Second, the termination of the secondment could take place at any time, regardless of whether it was for a fixed or indefinite period. The fear of termination of the secondment coupled with the feeling of having to meet the expectations of the Minister for Justice could influence the content of the decisions of the seconded judge in a way that was incompatible with the principle of judicial independence. Such termination would, in practice, amount to imposing disciplinary sanctions on the seconded judges.²²¹ Third, the Minister for Justice was also the Public Prosecutor General, meaning that he had authority over both prosecutors attached to the ordinary criminal courts and the seconded judges. This could give rise to doubts as to the impartiality of the seconded judges when they rule in such a case.²²² Fourth and last, in the main proceedings, the Court of Justice observed that the seconded judges continued to perform the duties of deputy disciplinary officers. This could affect the independence of the other members of the panels on which the seconded judges sat, since they were likely to fear that the seconded judge was or would be involved in disciplinary proceedings concerning them.²²³

Where an infringement action is brought before the Court of Justice, the latter will provide a definitive answer as to whether the Member State concerned has failed to fulfil its obligations under EU law. In so doing, it enjoys exclusive jurisdiction to evaluate the relevant facts and its effects, and to apply the relevant provisions of EU law to those facts. In the context of that action, it may also provide for interim relief, ensuring the effectiveness of its final judgment and preventing national measures – which at first sight, appear to be incompatible with the rule of law – from producing effects. In *Commission v. Poland (Independence of the Supreme Court)*, the Court of Justice issued an order in which it required Poland, *inter alia*, to suspend the relevant provisions of the law on the Supreme Court that were challenged by the Commission. It also ordered that Member State to take all necessary measures to reinstate judges of the Polish Supreme Court who were forced to retire, and to refrain from appointing new judges to replace the judges concerned by the contested provisions.²²⁴ It is worth pointing out that Poland complied with that order. Similarly, in *Commission v. Poland (Disciplinary Regime for Judges)*, the Court of Justice ordered Poland to suspend the application of the legislative provisions conferring jurisdiction on the Disciplinary Chamber, and to refrain from transferring pending cases to judges who do not comply with the guarantees of independence.²²⁵

By contrast, in pending case *Commission v. Poland (Independence and private life of judges)*, the Vice-President of the Court, acting upon request of the

²²⁰ *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931, ¶ 78.

²²¹ *Id.*, ¶¶ 81 to 83.

²²² *Id.*, ¶ 84.

²²³ *Id.*, ¶ 86.

²²⁴ See *Commission v. Poland*, Case C-619/18 R, EU:C:2018:1021.

²²⁵ See *Commission v. Poland*, C-791/19 R, EU:C:2020:277.

Commission, found that Poland had failed to comply with a previous interim order.²²⁶ Under the latter order,²²⁷ Poland was, *inter alia*, obliged to suspend the application of legislation that prohibited Polish judges from examining whether the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law, as provided for by EU law, had been respected. If, despite that prohibition, a Polish judge carried out such examination, the contested legislation also stated that he or she could face disciplinary sanctions. Since Poland had failed to comply with the interim order, the Vice-President imposed a penalty payment of 1 000 000 EUR per day until Poland complies with that order or, failing to do so, until the Court of Justice delivers its judgment in the infringement proceedings.²²⁸

III. CONCLUDING REMARKS

In the EU legal order, values matter. As the Court of Justice made clear in the *Conditionality Judgments*, the values contained in Article 2 TEU are not merely statements of policy guidelines or intentions, but they define ‘the very identity of the [EU] as a common legal order’.²²⁹

EU values must operate as the moral compass that helps Europeans to navigate through uncharted waters. They constitute the bridge between past and present, and serve as the foundation on which future generations must overcome the challenges ahead.

Can European integration move forward without upholding common values such as the rule of law? The Court of Justice has been categorical in its reply to that question, answering with a resounding “NO”. The EU is its values. They are embedded in the very DNA of the European integration project. Those values are the soul of the EU that enables the Member States to grow together whilst preserving their national identity. ‘United in diversity’ means, in my view, united by common values that we share and cherish and, at the same time, respecting our cultural and social differences.

Five years ago, when the Court of Justice issued its landmark judgment in *Associação Sindical dos Juízes Portugueses*, it indicated the path towards defending the values contained in Article 2 TEU. Upholding the rule of law is of cardinal importance for the rights that EU law confers on individuals and for the other founding values. That is because European integration and the rule of law go hand in hand. Ever since that judgment was delivered, the Court of Justice has developed and consolidated a line of case law that clarifies, in general, the meaning of the rule of law within the EU and, in particular, that of judicial independence.

²²⁶ See Vice-President of the Court of Justice, order of 27 October 2021, *Commission v Poland*, C-204/21 R, not published, EU:C:2021:877.

²²⁷ See Vice-President of the Court, order of 14 July 2021, *Commission v Poland*, C-204/21 R, EU:C:2021:593.

²²⁸ Vice-President of the Court, *Commission v Poland*, EU:C:2021:877, ¶ 64.

²²⁹ *Hungary v. Parliament and Council*, EU:C:2022:97, ¶¶ 127 and 232, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶¶ 145 and 264. See, in this regard, FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* 167 (2018) (who posits that European identity should be built ‘on adherence to basic liberal democratic principles’).

In the EU legal order, judges are not only protected in their individual capacity but also in their institutional capacity. Just like any individual, national judges have the right to effective judicial protection of the rights that EU law confers on them, a right enshrined in Article 47 of the Charter. In addition, by virtue of Article 19(1) TEU and Article 267 TFEU, those judges are protected as members of the courts of general jurisdiction for the application and enforcement of EU law. They are protected as the ‘arm of EU law’. Any national judge from the four corners of the EU may say ‘*iudex europeus sum*’ and benefit from that institutional protection stemming from the upholding of the rule of law within the EU. This means, *inter alia*, that a national measure that is repugnant to the principle of judicial independence is to be set aside. Since that institutional protection aims to prevent the EU’s constitutional structure from collapsing, it must operate at all times in the fields covered by EU law and may not be made conditional upon finding that the national measure at issue is implementing EU law.

Respect for the rule of law within the EU also means that the Court of Justice must not overstep the limits of its jurisdiction, by encroaching upon the prerogatives of the EU political institutions or the competences retained by the Member States. Those limits reflect the checks and balances laid down in the Treaties and, as such, are an integral part of the rule of law within the EU.

First, Article 19(1) TEU may not be interpreted as modifying the role that the Court of Justice plays in the context of the preliminary reference mechanism. A national court has no access to the preliminary reference mechanism in order to question, in a general fashion, whether legislative reforms comply with the principle of judicial independence, when that question has no bearing on the main proceedings.

Second, the notion of ‘judicial authority’, within the meaning of the EAW Framework Decision, is to be interpreted as including the national courts of the issuing Member State, even if the justice system of that Member State suffers from systemic or generalised deficiencies. Otherwise, the executing judicial authority would be empowered to suspend the EAW mechanism in respect of all the courts of that Member State. However, such empowerment would encroach upon the prerogatives of the European Council and those of the Council under Article 7 TEU, since it would establish a procedure parallel to that laid down in that Treaty provision.

Third and last, the Court of Justice has, time and again, stressed the fact that the organisation of justice in the Member States falls within their competences. Yet, in exercising those competences, they must comply with EU law. This means, in essence, that the rule of law within the EU does not prescribe a particular constitutional model but a framework of reference within which the Member States may make their own constitutional choices. It is in accordance with that framework of reference that the Court of Justice has developed the principle of judicial independence, allowing room for diversity. Member States are therefore free to choose different rules regarding the appointment, length of service and grounds for abstention, rejection and dismissal of judges, as well as different rules determining the disciplinary regime and type of personal liability for judicial error applicable to them. However, in order to comply with EU law, those rules must be such as ‘to

dispel any reasonable doubt in the minds of individuals as to the imperviousness of [those judges] to external factors and [their] neutrality with respect to the interests before [them]'. In order to determine whether those rules dispel those doubts, the Court of Justice and national courts must not only examine their normative content, but also the reasons behind their adoption and the way they are enforced. Just like the ECtHR, the Court of Justice has endorsed an understanding of judicial independence that includes both legal and factual elements (independence *de jure* and independence *de facto*). Moreover, when examining the relevant rules and the factual context in which they apply, the Court of Justice follows a combined assessment of all the relevant factors. Whilst one factor may not suffice in itself to call into question the principle of judicial independence, that factor taken together with others may cast doubt as to the independence of the national court in question.²³⁰

Most importantly, as a framework of reference, the rule of law requires 'value alignment'. Before joining the EU, a Member State must align its institutional and constitutional provisions with the values on which the EU is founded. A Member State must therefore establish a legal order where the exercise of public power is based on democratic principles, where fundamental rights are respected and where the rule of law is upheld. That alignment is a continuous process for as long as such a Member State remains within the EU. The level of protection of the EU values within a Member State existing at the moment of acquiring that status, is not the finish line but rather the starting point. Whilst that level of value protection may always be improved, it may not suffer value regression. This is an important development in the case law of the Court of Justice,²³¹ which shows beyond any doubt that authoritarian tendencies at national level have no room in the EU. Those tendencies can never be part of our European heritage, nor become a common constitutional tradition for future generations. If the EU is to operate as an area without internal frontiers, where there is liberty, democracy and justice for all, integration through the rule of law is the only way forward.

²³⁰ *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 142.

²³¹ *Repubblika*, EU:C:2021:311, ¶ 63; *Asociația 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393, ¶ 162; *Euro Box Promotion and Others*, EU:C:2021:1034, ¶ 162; *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 126, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 144.

