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The Identity of the EU Legal Order as a “Shield” for Judicial Independence in the (Polish) Rule of Law Crisis

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Abstract

In its recent case law the CJEU stated that the values contained in Article 2 TEU define the “very identity of the European Union as a common legal order”. The CJEU made also some further important statements on the perception and the functioning of Article 2 TEU values in the European legal space. This working paper takes a closer look at how the CJEU has used the value of rule of law in Art. 2 TEU to build a “shield” that serves as a defense for national judges against interference with their independence. This “shield” has been created on the basis of the principle of effective judicial protection under Article 19 (1)(2) TEU and Article 47 EUCFR. Such a “shield” shield is particularly useful in those EU Member States where material threats to the rule of law emerged, such as Poland. It benefits from the strong possibilities of the EU supranational legal system, i.e. the principle of direct effect and the principle of primacy. However, such a “shield” has also its limits, restrictions, and weak points. These are primarily due, on the one hand, to the procedural limitations of the preliminary ruling procedure, which is the main interface of cooperation between the national courts and the CJEU, and, on the other hand, to the fact that, ultimately, EU law must be effectively implemented and adopted into the national legal order by national authorities. However, during an ongoing rule of law crisis, not all state authorities will always be interested in correctly and effectively implementing European standards.

Keywords: Article 2, values, rule of law, effective judicial protection, Article 19 TEU, Article 47 EUCFR, identity on the EU legal order, primacy, direct effect, national courts, effet utile, effective application of EU law, judicial independence, rule of law crisis

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The Identity of the EU Legal Order as a “Shield” for Judicial Independence in the (Polish) Rule of Law Crisis

Maciej Taborowski¹

Introduction

The original purpose of my re:constitution project was to answer the question whether the value of the rule of law (Article 2 TEU) could be regarded as having a comparable weight for the EU legal order to that of the national identity clause (Art. 4 (2) TEU) on which Member States may rely within the scope of application of EU law. That would enable the answering of the question, to what extent the legal effects ascribed in the case law of the Court of Justice of the European Union (CJEU) to the national identity clause in Article 4(2) TEU may be transferred and applied to the value of the rule of law in Article 2 TEU. I assumed that the premise of the national identity clause is that there is a national inviolable core that must be protected from Europeanization.² This clause counterbalances i.a. the principle of loyal cooperation (Article 4(3) TEU) and can influence, among other things, the way in which Member States apply or evade EU law.³ Regarding the rule of law clause in Article 2 TEU, I referred to the concept of K. Lenaerts, who used the term "European public policy" in relation to the set of the most important imperative values and principles of the EU legal order, including the rule of law.⁴ I argued that this set could constitute the nucleus of an emerging "European identity clause", the elements of which must be strictly respected by the EU Member States,⁵ especially by national courts in the interpretation and application of all provisions of EU law, also, inter alia, of the EU internal market law provisions.

In the meantime the CJEU, in two cases C-156/21 *Commission v. Hungary*⁶ and 157/21 *Commission v. Poland*,⁷ initiated under Article 263 TFEU, concerning the validity of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020

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² M. Claes, *Negotiating Constitutional Identity or Whose Identity is It Anyway?* [w:] *Constitutional Conversations in Europe: Actors, Topics and Procedures*, red. M. Claes, M. de Visser, P. Propelier, C. Van De Heyning, Cambridge–Antwerp–Portland 2012, 206.

³ See B. Guastaferro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, „*Yearbook of European Law*” Volume 31, Issue 1, 2012, 263–318.

⁴ K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017), 54, *Common Market Law Review*, Issue 3, 805-840.

⁵ D. Sarmiento, *The EU's Constitutional Core*, (in:) *National Constitutional Identity and European Integration*, A. Saiz Arnaiz, C. Alcobarro Llivina, *Law and Cosmopolitan Values*, vol. 4, Intersentia, 2013.

⁶ Judgment of the Court (Full Court) of 16 February 2022, C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, 127.

⁷ Judgment of the Court (Full Court) of 16 February 2022, C-157/21 *Republic of Poland v European Parliament and Council of the European Union*, ECLI:EU:C:2022:98, 145.

on a general regime of conditionality for the protection of the Union budget,⁸ has confirmed explicitly that the values contained in Article 2 TEU “define the very identity of the European Union as a common legal order”.⁹ In those judgments the Court made also some further important statements on the perception and the functioning of Article 2 TEU values in the European legal space. The project's premise that Article 2 TEU can be considered a kind of a “European Identity Clause” in EU law has thus been confirmed.

What's more, in another precedent-setting judgment in the T-791/19 *Sped-Pro* case,¹⁰ the EU General Court confirmed the project's second premise that a violation of the value of the rule of law can in principle affect EU internal market law. According to that judgment, contrary to the principle of mutual trust and loyal cooperation (Art. 4 (3) TEU), the European Commission, has been obliged by the EU General Court to ascertain, before sending the complaint for examination to the national competition authority, whether the applicant company would receive effective judicial protection in the Polish legal order. The reason for the EU General Court's approach was the arguments of the applicant, which claimed that Poland has systemic flaws in respecting the value of the rule of law in the context of EU competition law (Art. 102 TFEU).

Given the above mentioned development in the CJEU's jurisprudence, in this working paper I will take a closer look at how the Court has shaped the value of rule of law as the “very identity of the EU legal order”¹¹, and how it has used the rule of law to build a “shield” that serves as a defense for national judges against interference with their independence on the basis of the principle of effective judicial protection under Article 19 (1)(2) TEU and Article 47 EUCFR. Such a “shield” is particularly useful in those EU Member States where there is an ongoing rule of law crisis, such as Poland.¹²

For this reason, I will start with a brief introduction to the Polish rule of law crisis i.e. a concise description of the problems of judicial independence in the Polish legal system in the light of European standards (point 1). Then we will demonstrate how the CJEU has defined the “identity of the EU legal order”¹³, around Article 2 TEU values, especially the value of the rule of law (point 2). We will then take a closer look at how the Court has built a “shield” based on Article 2 TEU, Article 19 (1) (2) TEU and Article 47 EUCFR in order to protect the independence of judges in the Member State's legal orders. Finally, I will also show the potential limits, restrictions, and weak points of such a “shield” (point 4).

⁸ OJ 2020 L 433I, p. 1, and corrigendum OJ 2021 L 373, 94.

⁹ Judgment of the Court (Full Court) of 16 February 2022, C-157/21 Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2022:98, 145.

¹⁰ Judgment of the General Court (Tenth Chamber, Extended Composition) of 9 February 2022, T-791/19 *Sped-Pro* S.A. v European Commission, ECLI:EU:T:2022:67.

¹¹ Judgment of the Court, 16 February 2022, C-157/21, para 145.

¹² See in general W. Sadurski, *Poland's constitutional breakdown*, Oxford 2019.

¹³ Judgment of the Court, 16 February 2022, C-157/21, para 145.

1. The Polish Rule of Law Crisis in a Nutshell

The "reform" of the Polish judiciary, which has been carried out by the Law and Justice's party having the majority in Parliament for several years, is aimed at changing the staffing of the judiciary.¹⁴ The process of appointing judges has been changed so that the ruling majority has been able to nominate "their" judges without scrutiny, especially to the Polish Supreme Court (opening of a "transfer window"¹⁵). To this end, the Constitutional Tribunal was first targeted and "packed".¹⁶ Then, the composition of the National Council of the Judiciary (NCJ), which proposes judges for nomination to the President was changed too. From a body that was supposed to safeguard the independence of judges, it was transformed into a body nominated by politicians.¹⁷ As a result of this process, the NCJ has been excluded from the European Network of Councils for the Judiciary (ENCJ) in October 2021.¹⁸ The judicial control over the appointments of Supreme Court judges was also practically removed.¹⁹ Presidents of courts throughout Poland have been changed and subordinated to the Minister of Justice as well.²⁰

Thanks to the activity of the European Commission in infringement proceedings, the references of Polish judges for preliminary questions to Luxembourg as well as by judges and citizens submitting complaints to Strasbourg, virtually every element of this judicial "reform" has already had its own international court ruling. All of them point at material contradictions with European standards of effective judicial protection (Art. 6 European Convention for Human Rights ("ECHR"), Art. 19 (1)(2) TEU, Art. 47 of the EU Charter of Fundamental Rights

¹⁴ The Court of Justice even used the statement that the reform of the retirement age of serving judges of the Polish Supreme Court was made [...] with the aim of side-lining a certain group of judges of that court – see Judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, *European Commission v Republic of Poland*, ECLI:EU:C:2019:531, para 82.

¹⁵ As the Polish Supreme Court stated in its preliminary referral to the CJEU in case C-508/19 (Supreme Court order of 15 July 2020, II PO 16/20, para 50), "It must therefore be clearly emphasised that in 2018-2019 there was a special 'transfer window' in the Polish legal system in which with a flagrant and evident violation of the constitutional standard and with full awareness of this by all concerned, appointments to serve in the Supreme Court were handed out [...] What is more, the circumstances under which these appointments took place give rise to justified doubts on the part of the individuals hoping to ensure the right to a court implementation of this right, since first the President of the Republic of Poland prepared draft laws allowing for the creation of courts that do not meet the requirements of independence and impartiality, and then on the basis of such provisions - in violation of then, on the basis of such legislation - in breach of constitutional procedural guarantees providing for prior judicial review of NCJ resolutions - appointed persons close to him to judicial positions".

¹⁶ See the Commission's Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final), paras 26-39, 92-113, as well as the launching by the European Commission of an infringement procedure against Poland because of serious concerns with respect to the Polish Constitutional Tribunal.

(https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070) (last access 28.06.2023). See also Judgment of the ECtHR in *Xero Flor w Polsce sp. z o.o. v. Poland*, Application no. 4907/18, 7 May 2021, CLI:CE:ECHR:2021:0507JUD000490718.

¹⁷ See judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596, 108. See e.g. also Judgment of the ECtHR in *Dolińska-Ficek and Ozimek v Poland*, Applications nos. 49868/19 and 57511/19, 11 November 2021, CE:ECHR:2021:1108JUD004986819, paras 290 and 320.

¹⁸ See <https://www.encj.eu/node/605> (last access 28.06.2023).

¹⁹ Judgment of the Court (Grand Chamber) of 2 March 2021 C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2020:1053.

²⁰ Judgment of ECtHR in case *Broda and Bojara v. Poland*, Applications nos. 26691/18 and 27367/18, 29 June 2021, CLI:CE:ECHR:2021:0629JUD002669118.

“EUCFR”). Yet despite these important rulings, some precedent-setting temporary injunctions²¹ as well as multi-million Euro fines for noncompliance,²² the breakdown of the independence of the judicial system continues. From the perspective of investors and citizens, court cases are taking longer and longer, legal certainty and the trust in the judiciary is decreasing.

One may wonder how a Member State can function in the European Union where more than half of the judges of the Supreme Court, including the person holding the position of its First President, and the entirety of judges sitting in two chambers: the Disciplinary Chamber²³ (now transferred into the Chamber of Professional Liability²⁴), and the Extraordinary Control and Public Affairs Chamber,²⁵ do not meet the European requirements of a court established by law (Art. 6 ECHR). This was confirmed by the European Court on Human Rights in Strasbourg (ECtHR) in cases such as *Reczkowicz*²⁶, *Dolińska Ficek*²⁷ or *Advance Pharma*.²⁸ This means no more, no less, that these judges (“new judges” of the SC) should at least not rule on matters that are covered by the scope of application of the ECHR. Because of Article 53 (3) of the EUCFR and the judgment in C-487/19 W.Ż.,²⁹ that conclusion should in principle also apply to the scope of application of EU law. In addition, judges directly covered by Strasbourg judgments stating that they do not meet the requirements of Article 6 ECHR will with time lose the possibility to refer preliminary questions to the CJEU based on Article 267 TFEU.³⁰ A

²¹ See e.g. the temporary injunctions ordered by the CJEU: order of the Court (Grand Chamber) of 17 December 2018 C-619/18 R European Commission v Republic of Poland, ECLI:EU:C:2018:1021; order of the Court (Grand Chamber) of 8 April 2020 C-791/19 R European Commission v Republic of Poland, ECLI:EU:C:2020:277; order of the Court (Grand Chamber) of 14 July 2021 C-204/21 R European Commission v Republic of Poland, ECLI:EU:C:2021:593.

²² See order of the Court (Grand Chamber) of 27 October 2021 C-204/21 R European Commission v Republic of Poland, ECLI:EU:C:2021:878 (ordering the payment of a fine of 1 million Euro per day).

²³ Judgment of the Court (Grand Chamber) of 15 July 2021 C-791/19 European Commission v Republic of Poland, ECLI:EU:C:2021:596.

²⁴ The Supreme Court's Professional Responsibility Chamber also includes the “new” Supreme Court judges. Thus, there is a concern that they will not meet the requirement of a court established by law under Article 6 ECHR. This may be evidenced in particular by the first interim injunctions of the ECtHR in the cases of Polish judges who were to be tried before the Supreme Court's Chamber of Professional Responsibility – see the press release concerning applications nos. 18632/22, 6904/22, 15928/22, 46453/21, 8687/22, 8076/22: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7407019-10135002&filename=Interim%20measures%20> (last access 28.06.2023).

²⁵ See judgment of the Court (Grand Chamber) of 6 October 2021 C-487/19, Proceedings brought by W.Ż., ECLI:EU:C:2021:798, paras 158-160.

²⁶ Judgment of the ECtHR in *Reczkowicz v. Poland*, Application no. 43447/19, 22 July 2021, ECLI:CE:ECHR:2021:0722JUD004344719.

²⁷ Judgment of the ECtHR in *Dolińska-Ficek and Ozimek v Poland*, Applications nos. 49868/19 and 57511/19, 11 November 2021, CE:ECHR:2021:1108JUD004986819.

²⁸ Judgment of the ECtHR in *Advance Pharma sp. z o.o v. Poland*, Application no. 1469/20, 3 February 2022, ECLI:CE:ECHR:2022:0203JUD000146920.

²⁹ Judgment of the Court (Grand Chamber) of 6 October 2021 C-487/19, Proceedings brought by W.Ż., ECLI:EU:C:2021:798.

³⁰ See judgment of the Court (Grand Chamber) of 29 March 2022 C-132/20, BN and Others v Getin Noble Bank S.A., ECLI:EU:C:2022:235, paras 72-73.

potential breakdown of judicial cooperation with Poland based on mutual trust within the EU Area of Freedom, Security and Justice cannot be excluded.³¹

The situation is not better at the Polish Constitutional Tribunal, now composed exclusively of judges nominated by ruling majority. For the moment, mostly representatives of the authorities willingly file motions asking the Constitutional Tribunal to invoke Polish constitutional identity and to restrict the effects of the principle of primacy of EU law, or to eliminate from application in Poland particular ECtHR and CJEU judgments indicating violations of European standards concerning the independence of the judiciary and the rule of law.³² The Constitutional Tribunal gives the authorities exactly what they want.³³ That is also one of the reasons why, for the first time in history of European integration, the European Commission initiated an infringement procedure, claiming that the Polish Constitutional Tribunal is partially not a court established by law,³⁴ that it does not guarantee an effective and independent control of constitutionality of law and that it undermines the primacy and effectiveness of the EU legal order.³⁵

Another element of this judicial "reform" is a regular intimidation of Polish judges.³⁶ A law has been adopted prohibiting judges from applying the judgments of the European courts (ECtHR and CJEU) regarding the independence of the judiciary under threat of disciplinary sanctions and criminal penalties ("muzzle law"³⁷). For example, this was felt by Judge Agnieszka Niklas-Bibik,³⁸ who dared to claim in her judicial decision that a common court had been composed of judges nominated in violation of EU law and ECtHR rulings. This moment changed her life. After 20 years in office in the Regional Court in Słupsk, the court president, appointed (without any legal criteria) by the Minister of Justice, transferred Judge Niklas-Bibik from the Appeal Division to the Division of First Instance of the Regional Court. All her cases were taken away, access to the files has been denied and she was refused to set up an E-curia account to make a preliminary reference to the CJEU.³⁹ In addition, judge Niklas-Bibik was suspended from duty for the period of one month. Now she faces disciplinary sanctions and criminal sanctions,

³¹ See e.g. the preliminary reference from a German court in case C-819/21 (refusal to recognise a Polish criminal conviction on the basis of Article 2 TEU in the light of the framework decision 2008/909).

³² There is even a proposal by the Minister of Justice to declare that the asking of questions by Polish courts regarding the principle of effective judicial protection and independence of national courts under Article 267 TFEU is incompatible with the Polish Constitution (see pending case K 7/18).

³³ Regarding CJEU judgments see judgment of the Constitutional Tribunal of 14 July 2021 in case P 7/21 and judgment of the Constitutional Tribunal of 7 October 2021 in case K 3/21; regarding the exclusion of ECtHR judgments see judgment of the Constitutional Tribunal of 10 March 2022 in case K 7/21 and judgment of the Constitutional Tribunal of 24 November 2021 in case K 6/21.

³⁴ Judgment of the ECtHR in *Xero Flor w Polsce sp. z o.o. v. Poland*, Application no. 4907/18, 7 May 2021, ECLI:CE:ECHR:2021:0507JUD000490718.

³⁵ See press release of the Commission under https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070 (last access 28.06.2023).

³⁶ See also the judgment of the ECtHR in *Juszczyszyn v. Poland*, Application no. 35599/20, 6 October 2022, ECLI:CE:ECHR:2022:1006JUD003559920 where for the first time Article 18 ECHR was used against the Polish government.

³⁷ For detailed information about the "muzzle law" see order of the Court (Grand Chamber) of 14 July 2021 C-204/21 R *European Commission v Republic of Poland*, ECLI:EU:C:2021:593.

³⁸ See in detail <https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/> (last access 28.06.2023).

³⁹ Cases pending before the CJEU: C-648/21 and C-647/21.

which will be decided, among others, by the Supreme Court's Chamber of Professional Responsibility, which is composed mainly of flawed "new" judges, and which is, just as the former Disciplinary Chamber of the Supreme Court was,⁴⁰ most probably not a court established by law under Article 6 ECHR and Article 19 (1)(2) TEU or Article 47 EUCFR.⁴¹

These "reforms" of the Polish judiciary have led to Poland being in a very difficult position today in terms of meeting the standards of the rule of law. They resulted also in an adverse effect on relations with the EU and other international organizations. In view of the problems of compliance in Poland with the rule of law, the European Union had to "awake" its legal mechanisms to find an adequate reaction for the protection of the EU legal order based on common values enshrined in Art 2 TEU, the principle of equality of Member States (Art. 4 (2) TEU), as well as the principle mutual trust and loyal cooperation (Art. 4 (3) TEU).

2. The Rule of Law as the Identity of the EU Legal Order

The EU legal system, including its specific characteristics arising from the very nature of EU law⁴² and its decentralized enforcement, is built on the assumption that Member States observe all the values contained in Art. 2 TEU.⁴³ That assumption serves the principle of equality of the Member States before the treaties⁴⁴ and as basis for trust in the legal systems of Member States⁴⁵ that those values and the law of the EU will be respected.⁴⁶

The rule of law itself constitutes a part of the common heritage of European states⁴⁷ and plays a vital role in the EU legal order. This is because it is not only a common value for all EU Member States, but moreover both the EU⁴⁸ and the states which become EU Members must respect and promote Article 2 TEU.⁴⁹ Compliance with Article 2 TEU values cannot be reduced to an obligation which a candidate State to the EU must meet to accede to the European Union and which it may disregard after its accession.⁵⁰ The rule of law is a legally binding constitutional principle of EU Law and respect for the rule of law is a prerequisite for protection of all the other values of Article 2 TEU, all rights and obligations deriving from the

⁴⁰ See Judgment of the ECtHR in *Reczkowicz v. Poland*, Application no. 43447/19, 22 July 2021, ECLI:CE:ECHR:2021:0722JUD004344719 and judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596.

⁴¹ This may be evidenced in particular by the first interim injunctions of the ECtHR regarding the Supreme Court's Chamber of Professional Responsibility – see press release <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7407019-10135002&filename=Interim%20measures%20> (last access 28.06.2023).

⁴² Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, paras 157-177.

⁴³ Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para 168.

⁴⁴ K. Lenaerts, *La vie après l'avis...*, 807.

⁴⁵ Judgment of the Court (Grand Chamber) of 27 February 2018, C- 64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, para 30.

⁴⁶ Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para 168, 191.

⁴⁷ G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, Oxford, 2013, p. 12.

⁴⁸ See Art. 3 (1) TEU, Art. 13 (1) TEU, Art. 21 (1) TEU.

⁴⁹ See Art. 49 TEU.

⁵⁰ Judgment of the Court (Full Court) of 16 February 2022, C-157/21 *Republic of Poland v European Parliament and Council of the European Union*, ECLI:EU:C:2022:98, para 144.

Treaties and from international law, including fundamental rights and for mutual trust of citizens, businesses, and national authorities in the legal systems of the Member States.⁵¹ The rule of law is also essential for the operation of the Internal Market, equal treatment of economic operators, and for investors.⁵² Furthermore, it constitutes also a pre-requisite for mutual trust in the Area of Freedom, Security and Justice (AFSJ).⁵³ In view of the mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, who are now engaged in a “process of creating an ever closer union among the peoples of Europe”,⁵⁴ actions undertaken by a EU Member State which threaten the rule of law, are a threat to the effectiveness of the entire EU legal system, the legal systems of other Member States, and for the rights of individuals derived from EU law, including fundamental rights.⁵⁵

The rule of law is an ‘umbrella principle’,⁵⁶ the content of which requires clarification of its substance in the form of operative standards.⁵⁷ The ultimate arbitrator of the shape of the rule of law as a common EU value is the CJEU (Article 19 (1)(1) TEU), which in its case law gradually discovers the elements constituting the rule of law within the meaning of Art. 2 TEU, such as: the principle of division of powers,⁵⁸ the principle of effective judicial protection (including the principle of independence of the courts as an essential aspect of the right to effective judicial protection and the fundamental right to a fair trial),⁵⁹ or the effective

⁵¹ Communication from the Commission to the European Parliament and the council " A new EU Framework for Strengthening the Rule of Law" (COM/2014/0158 final), p. 4.

⁵² Council Recommendation of 13 July 2017 on the 2017 National Reform Programme of Poland and delivering a Council opinion on the 2017 Convergence Programme of Poland (COM/2019/521 final).

⁵³ Judgment of the Court (Grand Chamber) of 27 February 2018, C- 64/16, Associação Sindical dos Juizes Portugueses, EU:C:2018:117, para 30; Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para 168.

⁵⁴ Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para 167.

⁵⁵ Communication from the Commission to the European Parliament and the council " A new EU Framework for Strengthening the Rule of Law" (COM/2014/0158 final), p. 4.

⁵⁶ L. Pech, “The Rule of Law as a Constitutional Principle of the European Union”, 4 Jean Monnet Working Paper (2009), p. 49 and 53 referring to G. Marshall, “The Rule of Law. Its Meaning, Scope and Problems” (1993) 24 Cahiers de philosophie politique et juridique 43, p. 43: “Both the rule of law and the separation of powers “are umbrella terms or labels for a range of institutional provisions whose various elements have to be assembled in the shape of numerous more detailed rules.”

⁵⁷ Ch. Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’, in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, Cambridge, 2016) , p. 67. For i.a. such a purpose the Commission has set up the Communication from the Commission to the European Parliament and the council " A new EU Framework for Strengthening the Rule of Law" (COM/2014/0158 final) with six principles being the “core” of the rule of law: The Framework declare that the principles constituting the rule of law include (a) legality, (b) legal certainty, (c) prohibition of arbitrariness of the executive powers, (d) independent and impartial courts, (e) effective judicial review including respect for the fundamental rights and (f) equality before the law.

⁵⁸ Judgment of the Court (Fourth Chamber) of 10 November 2016 *Openbaar Ministerie v Ruslanas Kovalkovas*, EU:C:2016:861.

⁵⁹ Judgment of the Court (Grand Chamber) of 28 March 2017 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, EU:C:2017:236. See also judgment of the Court (Grand Chamber) of 27 February 2018, C- 64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117, judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, *European Commission v Republic of Poland.*, ECLI:EU:C:2019:531 and judgment of the Court (Grand Chamber) of 25 July 2018 C-216/18 *PPU LM*, ECLI:EU:C:2018:586.

application of EU law.⁶⁰ In recent rulings the CJEU added that the rule of law demands that in all Member States there is an impartial, independent, and efficient administration and judiciary adequately equipped, inter alia, to fight corruption at least in the context of crimes against the EU budget.⁶¹ Independent prosecution is also demanded regarding criminal or disciplinary investigations against judges.⁶²

In the Full Court judgments in cases C-156/21⁶³ and 157/21⁶⁴, the CJEU made some important statements about the values of Art. 2 TEU and their legal characteristics. First, that the values in Article 2 TEU “define the very identity of the European Union as a common legal order”⁶⁵ and that they “are an integral part of the very identity of the European Union as a common legal order”.⁶⁶ Second, Article 2 TEU values are not a mere statement of policy guidelines or intentions⁶⁷ but that they constitute an obligation as to the result to be achieved on the part of the Member States.⁶⁸ Third, Article 2 TEU contains values which are given concrete expression in principles comprising legally binding obligations for the Member States.⁶⁹ Fourth, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.⁷⁰ And finally, a Member State cannot amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law⁷¹ after accession to the EU.

Regarding the EU values, K. Lenaerts referred to the concept of European public policy, understood as a set of core EU values with which all Member States should adhere to.⁷² In this sense, the delimitation of the scope of the peremptory elements of the Union's legal order based on Article 2 TEU means that Member States which do not respect these values will have to reckon with a limitation of mutual trust also in terms of the national public orders of other Member States. This will be permitted by the set of values that fall within the scope of

⁶⁰ Order of the Court (Grand Chamber) of 20 November 2017 C-441/17 R, *European Commission v Republic of Poland*, ECLI:EU:C:2018:255, para 102.

⁶¹ Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, para. 159. See also 2022 Rule of Law Report Country Chapter on the rule of law situation in Poland (SWD(2022) 521 final), in which the Commission requires the separation in Poland of the function of the Minister of Justice and the State Prosecutor General; https://ec.europa.eu/info/sites/default/files/48_1_194008_coun_chap_poland_en.pdf. (last access 13.07.2023).

⁶² Judgment of the Court (Grand Chamber) of 18 May 2021, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspekția Judiciară and Others*, ECLI:EU:C:2021:393, para 199.

⁶³ Judgment of the Court (Full Court) of 16 February 2022, C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, 127.

⁶⁴ Judgment of the Court (Full Court) of 16 February 2022, C-157/21 *Republic of Poland v European Parliament and Council of the European Union*, ECLI:EU:C:2022:98, para 145.

⁶⁵ *Ibidem*, para 145.

⁶⁶ *Ibidem*, para 264.

⁶⁷ *Ibidem*, para 264.

⁶⁸ *Ibidem*, para, 201.

⁶⁹ *Ibidem*, para 264.

⁷⁰ *Ibidem*, para 145.

⁷¹ Judgment of the Court (Grand Chamber) of 20 April 2021 C-896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, paras 63 to 65.

⁷² K. Lenaerts, *La vie après l'avis...*, s. 838.

European public policy. This set, as K. Lenaerts rightly points out, is necessary to preserve the functionality of the EU supranational legal order, together with the primacy, as well as the uniform and effective application of EU law.

According to K. Lenaerts, the principle of mutual trust, which is not explicitly expressed in EU primary law, has its constitutional source in the principle of equality of Member States, as expressed in Article 4(2) TEU. The principle of equality thus means that all Member States, within the scope of the application of EU law, are equally bound to respect and promote EU values. This also applies to the rule of law. The fundamental rights referred to in Articles 2 and 6 TEU are also part of these values. As K. Lenaerts argues, all Member States are equally obliged to ensure effective judicial protection of individual's rights derived from EU law (Art. 19(1) (1) TEU and Art. 47 EUCFR).⁷³

Mutual trust in the European legal space is thus directly linked to the need for Member States to respect the values of Article 2 TEU. In respect of this obligation, Member States are equal and, consequently, if they comply with this obligation, they are treated equally by the EU institutions and other Member States, especially by their courts. A key benefit of complying with the EU values of Article 2 TEU is the mandatorily imposed presumption of mutual trust in the legal systems of the Member States. As K. Lenaerts explains, because of the need to comply with a certain set of common rules ('Union of Values'), EU Member States are considered equal, in contrast to third countries which, from the perspective of complying with EU values, are not treated on an equal footing with Member States precisely because of the absence of a binding set of common values.⁷⁴

These assumptions should be supplemented by the remarks of the CJEU regarding the principle of equality of Member States before the Treaties in Article 4 (2) TEU.⁷⁵ In joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, criminal proceedings against PM and Others⁷⁶ the Court stated, that "[...] the Union can only respect this equality if it is impossible for the Member States, according to the principle of the primacy of Union law, to enforce a unilateral measure of whatever kind against the Union legal order". This statement refers explicitly to the principle of the primacy of EU law. In the C-430/21 RS case, the Court found that "the undermining of the independence of national judges [...] would also be incompatible with the principle of equality between the Member States [...], where the disciplinary liability of a national judge is incurred on the ground that he or she has refused to apply a decision of the constitutional court of the Member State concerned by which that court refused to give effect to a preliminary ruling from the Court."⁷⁷ Therefore, it seems that that infringing upon the identity of the EU legal order enshrined in Article 2 TEU might also been regarded as infringement of the principle of equality of Member States. Especially, since

⁷³ K. Lenaerts, *La vie après l'avis...*, s. 808.

⁷⁴ K. Lenaerts, *La vie après l'avis...*, s. 809.

⁷⁵ M. Claes, *The equality of the Member States*. Research Handbook on General Principles of EU Law: Constructing Legal Orders in Europe, (in:) eds. Katja Ziegler; Päivi Neuvonen; Violeta Moreno-Lax. Cheltenham/Northampton: Edward Elgar Publishing, 2022. pp. 99-117 (Research Handbooks in European Law series).

⁷⁶ Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, para 249.

⁷⁷ Judgment of the Court (Grand Chamber) of 22 February 2022, C-430/21, *Proceedings brought by RS*, ECLI:EU:C:2022:99, para 88.

compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State.⁷⁸ This has already been indicated by situations where systemic problems in the respect of either fundamental rights⁷⁹ or the rule of law value result in different treatment in relation to other Member States.

In this regard, in the context of the rule of law, one can point in particular at the judgment in case C-216/18 LM⁸⁰, which, in the event of systemic problems with the rule of law (independence of the judiciary and the right to a fair trial), allows national courts to waive mutual trust and to suspend the surrender of a person under an European Arrest Warrant to the state where the rule of law problems emerged. Such a waiver would not be possible regarding those Member States which do not violate the rule of law in a systemic way. The *Sped-Pro* judgment⁸¹, in which the “LM test” was applied to the competition law regime and Article 102 TFEU (abuse of a dominant market position), also falls within this trend. Here, the cooperation between the European Commission and the national competition authorities is based also on mutual trust and loyalty. Under normal circumstances, the European Commission would send the claim of the applicant company to the national competition authorities since they are in a better position to make a decision concerning the national market. But since in Poland a serious and systemic rule of law problem has emerged, the European Commission may not rely on mutual trust and may not think that Polish authorities will be sufficiently independent and act according to the principle of loyalty. Poland and its legal system are thus treated in a different way than other Member States, where a systemic rule of law problem has not emerged. In that concrete case, the EU General Court ordered the European Commission to perform an additional review based on the “LM test”⁸² in order to check whether the claimant company has a chance to receive effective protection of her rights stemming from EU law, especially from the EUCFR, before the Polish competition authority and Polish courts.

Finally, in the light of the CJEU case law, one of the fundamental guarantees of respect for the rule of law is the judicial system, which is intended to preserve the coherence and uniformity of the application of EU law. Article 19 (1) TEU, which concretizes the value of the rule of law mentioned in Article 2 TEU, entrusts the CJEU and national courts with ensuring judicial control in the legal system of the European Union. The core element of this system is the preliminary ruling procedure established by Article 267 TFEU. That procedure ensures a dialogue between the CJEU and the national courts of the Member States. The existence of

⁷⁸ Judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 European Commission v Republic of Poland, ECLI:EU:C:2021:596, para 51.

⁷⁹ See e.g. judgment of the Court (Grand Chamber) of 21 December 2011, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECLI:EU:C:2011:865 or Judgment of the Court (Grand Chamber) of 5 April 2016, joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, ECLI:EU:C:2016:198.

⁸⁰ Judgment of the Court (Grand Chamber) of 25 July 2018 C-216/18 PPU LM, ECLI:EU:C:2018:586.

⁸¹ Judgment of the General Court (Tenth Chamber, Extended Composition) of 9 February 2022, T-791/19 Sped-Pro S.A. v European Commission, ECLI:EU:T:2022:67.

⁸² See judgment of the General Court (Tenth Chamber, Extended Composition) of 9 February 2022, T-791/19 Sped-Pro S.A. v European Commission, ECLI:EU:T:2022:67, paras 92-106.

such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the rule of law.⁸³

Thus, the above remarks indicate that the rule of law, as well as its components, such as the principle of effective judicial protection, relating inter alia to the guarantees of independence of judges, occupy an important place in the hierarchy of the EU legal system.⁸⁴ As it has been presented, the CJEU has also pointed out that the EU must be able to defend Article 2 TEU values, and that independent national courts are key for those values to be protected.

It is therefore not surprising that in a situation where, as in Poland, the independence of the judiciary is threatened⁸⁵, many tools not previously used have been activated by the EU institutions. For the first time, the Commission has initiated a procedure based on the Communication "New EU Framework for Strengthening the Rule of Law"⁸⁶ as well as the procedure under Art. 7(1) TEU.⁸⁷ Also, for the first time, the Commission decided to bring an Art. 258 TFEU infringement action before the CJEU for violating by a Member State of the independence of the national court within the meaning of Article 267 (3) TFEU (here: the Polish Supreme Court).⁸⁸ Regarding Poland, new types of temporary injunctions, e.g., suspending national laws, that saved the Polish Supreme Court⁸⁹, or comprising pecuniary penalties were issued by the CJEU.⁹⁰ To exert the necessary pressure, the European Commission and the EU Council have also used the so called "milestones", aiming at restoring the independence of the judiciary, in the context of the EU COVID Reconstruction Fund.⁹¹

Polish judges try to save their independence by recalling European legal standards and using the available judicial paths before the ECtHR, but also by initiating the preliminary ruling procedure before the CJEU. In that way many preliminary judgments of the CJEU have been

⁸³ Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Criminal proceedings against PM and Others, ECLI:EU:C:2021:1034, paras 219 and 222.

⁸⁴ Therefore, as the identity of the EU legal order, they should be not subject to political negotiations with Member States infringing the rule of law. That is one of the reasons for the annulment actions taken by four European judicial associations against the Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland under Article 263 TFEU (not published) - see pending cases: Medel / Council (T-530/22); International Association of Judges / Council (T-531/22); Association of European Administrative Judges / Council (T-532/22); Rechteren voor Rechteren / Council (T-533/22).

⁸⁵ See point 1.

⁸⁶ Communication from the Commission to the European Parliament and the Council "A new EU Framework for Strengthening the Rule of Law" (COM/2014/0158 final).

⁸⁷ Commission's Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final).

⁸⁸ Judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, European Commission v Republic of Poland., ECLI:EU:C:2019:531.

⁸⁹ Order of the Court (Grand Chamber) of 17 December 2018 C-619/18 R European Commission v Republic of Poland, ECLI:EU:C:2018:1021.

⁹⁰ See order of the Court (Grand Chamber) of 14 July 2021 C-204/21 R European Commission v Republic of Poland, ECLI:EU:C:2021:593 and order of the Court (Grand Chamber) of 27 October 2021 C-204/21 R European Commission v Republic of Poland, ECLI:EU:C:2021:878 (ordering the payment of a fine of 1 million Euro per day).

⁹¹ Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland under Article 263 TFEU (not published) and Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland (COM/2022/268 final) - <https://eur-lex.europa.eu/legal-content/PL/TXT/HTML/?uri=CELEX:52022PC0268&from=EN> (last access 28.06.2023).

submitted which relate to the principle of effective judicial protection which is an expression of the value of rule of law. One may even consider that it is the Polish courts that have contributed mostly to the development of standards of national judicial independence against the background of the principle of effective judicial protection in the last years. It is thus clear that they perceive EU law as a “shield” that can protect the Polish legal system and safeguard the independence of national judges.

Let us therefore now take a closer look at this “shield” which the CJEU has created on the basis of the value of the rule of law as the “very identity” of the EU legal order and which protects the independence of the judiciary on the basis of Article 2 TEU, Article 19(1)(2) TEU and Article 47 EUCFR.

3. The “Shield” for Judicial Independence (Art. 2 TEU/Art. 19 (1)(2) TEU/Art. 47 EUCFR)

First, a significant element of this shield has been established in the C-64/16 ASJP (“Portuguese judges”) judgment.⁹² Because of Article 19 (1)(2) TEU, the Court offered protection to all national judges based on the principle of effective judicial protection “in the fields covered by Union law”. To be protected it is sufficient for national courts (in the meaning of Article 267 TFEU) to potentially rule on questions concerning the application or interpretation of EU law. In such a situation, the Member State concerned must ensure that the courts meet the requirements of effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU interpreted in the light of Article 47 EUCFR. Such a protection requires from the Member States to maintain the independence of a national court. That is essential especially for individuals who should have access to an ‘independent’ court as one of the requirements stemming from the right to fair trial (Article 47 EUCFR).

Such an interpretation of the principle of effective judicial protection adopted by the CJEU gives protection to the national judge against the executive and legislative powers of the State, as well as protection to the rules and procedures applied by the national courts in areas covered by EU law. By way of this interpretation, the C-64/16 ASJP judgment created a new type of case that national courts and the CJEU can deal with. A national judge affected by an interference with his/her independence can defend himself under EU law by bringing his/her own case (before national courts) to protect his/her status as a European judge.⁹³ By the findings of the C-64/16 ASJP judgment also, the possibilities of the European Commission in infringement proceedings under Article 258 TFEU have been extended.⁹⁴ Especially, Article 19

⁹² Judgment of the Court (Grand Chamber) of 27 February 2018, C- 64/16, Associação Sindical dos Juízes Portugueses, EU:C:2018:117, paras 40-41.

⁹³ See e.g. Judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, ECLI:EU:C:2019:982.

⁹⁴ See judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, European Commission v Republic of Poland., ECLI:EU:C:2019:531.

(1)(2) TEU and Article 47 EUCFR give the possibility to assess the independence of a national court against EU standards both by other national courts⁹⁵ and the CJEU.⁹⁶

Second, the interpretation of Article 19(1)(2) TEU in the C-64/16 ASJP case has brought within the scope of application of the principle of effective judicial protection a whole new range of cases concerning national judges concerning, i.e., remuneration,⁹⁷ retirement,⁹⁸ rules on the extension of a judge's term of office;⁹⁹ the procedure for the nomination and appointment of judges, their independence,¹⁰⁰ their status as a court established by law,¹⁰¹ the judicial review of the procedure for the appointment of judges,¹⁰² participation of judicial self-government in the procedure for the appointment of judges,¹⁰³ delegation of judges by the Minister of Justice to a court of higher instance,¹⁰⁴ disciplinary or penal rules against judges,¹⁰⁵ but also the way in which the management of a national court distributes cases to judges.¹⁰⁶ Such a broad scope of application of Article 19 (1)(2) TEU offers to the national judge a complex legal protection and strengthens his position vis-à-vis hostile interventions of other branches of the State.

Third, in reaction i.a. to the conduct of Polish authorities producing a chilling effect on national judges by initiating disciplinary and penal proceedings against them for the application of EU law, the CJEU made clear that Article 19 (1)(2) TEU and Article 47 EUCFR demand that such proceedings must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.¹⁰⁷ Especially, the guarantees stemming from Articles 47 and 48 EUCFR should be safeguarded, in particular the right to defense, and the possibility of bringing legal proceedings to challenge the disciplinary

⁹⁵ Judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982.

⁹⁶ Judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596.

⁹⁷ Judgment of the Court (Grand Chamber) of 27 February 2018, C- 64/16, *Associação Sindical dos Juizes Portugueses*, EU:C:2018:117.

⁹⁸ Judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, *European Commission v Republic of Poland*, ECLI:EU:C:2019:531.

⁹⁹ Judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, *European Commission v Republic of Poland*, ECLI:EU:C:2019:531 but also judgment of the Court (Grand Chamber) of 5 November 2019 C-192/18 *European Commission v Republic of Poland*, ECLI:EU:C:2019:924.

¹⁰⁰ Judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982.

¹⁰¹ Judgment of the Court (Grand Chamber) of 6 October 2021 C-487/19, *Proceedings brought by W.Ż.*, ECLI:EU:C:2021:798 and judgment of the Court (Grand Chamber) of 22 March 2022, C-508/19 *M.F. v J.M.*, ECLI:EU:C:2022:201.

¹⁰² Judgment of the Court (Grand Chamber) of 2 March 2021 C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2020:1053.

¹⁰³ Pending cases C-181/21 and C-269/21.

¹⁰⁴ Judgment of the Court (Grand Chamber) of 16 November 2021, C-748-754/19, *Criminal proceedings against WB and Others*, ECLI:EU:C:2021:931.

¹⁰⁵ Judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596.

¹⁰⁶ Order of the Court (Tenth Chamber) of 2 July 2020, C-256/19, *S.A.D. Maler und Anstreicher OG v Magistrat der Stadt Wien and Bauarbeiter Urlaubs- und Abfertigungskasse*, ECLI:EU:C:2020:523.

¹⁰⁷ Judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596, para 61.

bodies' decisions before an independent court.¹⁰⁸ A total exclusion of disciplinary liability of a judge as a result of his/her judicial decisions cannot be ruled out. Nevertheless, it should be restricted to serious or totally inexcusable forms of conduct on the part of judges. That would comprise, for example, infringing deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law with which they are supposed to ensure compliance, or in acting arbitrarily or denying justice when they are called upon, as guardians of the duty of adjudicating, to rule in disputes which are brought before them by individuals.¹⁰⁹ The liability should be based on objective and verifiable criteria, arising from requirements relating to the sound administration of justice, and also by guarantees designed to avoid any risk of external pressure on the content of judicial decisions and thus helping to dispel, in the minds of individuals, any reasonable doubts as to the imperviousness of the judges concerned and their neutrality with respect to the interests before them.¹¹⁰ But the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot trigger the disciplinary liability of the judge concerned.¹¹¹ It is also not allowed to punish national judges for initiating the preliminary procedure to the CJEU under Article 267 TFEU,¹¹² or even for disregarding a judgment of a national constitutional court which is in breach of EU law or has been issued by a constitutional tribunal that does not meet the criteria of a court established by law.¹¹³ Additionally, the mere prospect of opening a disciplinary investigation is, as such, liable to exert pressure on those who have the task of adjudicating in a dispute.¹¹⁴ In the C-487/19 *W.Ż.* case the CJEU additionally introduced a category of actions that may constitute a way of exercising control over the content of judicial decisions by having an "effect similar to those of a disciplinary sanction",¹¹⁵ such as transfers of a judge without his/her consent to another court or another division of the same court.¹¹⁶ The same effect may be exercised by

¹⁰⁸ Judgment of the Court (Grand Chamber) of 18 May 2021, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, ECLI:EU:C:2021:393, para 198.

¹⁰⁹ Judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19, *European Commission v Republic of Poland*, ECLI:EU:C:2021:596, para 137 and judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, para 238.

¹¹⁰ Judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19, *European Commission v Republic of Poland*, ECLI:EU:C:2021:596, para 139 and judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, para 240.

¹¹¹ Judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596, para 138 and judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, para 239.

¹¹² Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, para 227.

¹¹³ Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, para 242.

¹¹⁴ Judgment of the Court (Grand Chamber) of 18 May 2021, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, ECLI:EU:C:2021:393, para 199.

¹¹⁵ Judgment of the Court (Grand Chamber) of 6 October 2021 C-487/19, *Proceedings brought by W.Ż.*, ECLI:EU:C:2021:798, paras 115 and 118.

¹¹⁶ *Ibidem*, para 114.

a termination of the secondment of a judge (by the minister for justice without any criteria) without his/her consent.¹¹⁷

Fourth, the CJEU also imposed some requirements on the Member States' prosecution services that they must comply with (on the part of prosecutors pursuing judges) because of the need to protect judicial independence. In a judgment concerning Romania, in joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația „Forumul Judecătorilor din România”*,¹¹⁸ the Court stated, that since the prospect of opening a disciplinary investigation is, as such, liable to exert pressure on those who have the task of adjudicating in a dispute, it is essential that the body competent to conduct investigations and bring disciplinary proceedings should act objectively and impartially in the performance of its duties and, to that end, be free from any external influence.

Fifth, the CJEU reinforced the protection offered to national courts by performing an in-depth test not only of an isolated single legislative solutions or other Member State actions but by additionally reviewing the problem with the independence of judges in a systemic manner. The changes to the judicial system are evaluated against the general background of the legal system by checking whether a Member State amended its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law. The Member States are required to ensure that, in the light of that value, any regression of their laws on the organization of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary.¹¹⁹ The deterioration in the state of legislation concerning judicial independence is additionally assessed by measuring the cumulative effect of measures taken by the authorities of a Member State rather than isolated regulations that interfere with the rule of law. This allows to appraise the overall situation in the Member State and not just individual legislative solutions. Such a distinction has been made by the Court e.g. in the C-257/19 *Land Hessen* case, where the Court differentiated between the ruling in joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others*,¹²⁰ where a cumulative effect was present, and the circumstances referred to by the German court in C-272/19 *Land Hessen*, where such an effect was missing.¹²¹ The proper appraisal of that cumulative effect was shown in case C-791/19 *Commission v. Poland*, where the CJEU applied in infringement proceedings under Art. 258 TFEU the criteria taken from the ruling in joined cases C-585/18, C-624/18 and C-625/18

¹¹⁷ Judgment of the Court (Grand Chamber) of 16 November 2021, C-748-754/19, *Criminal proceedings against WB and Others*, ECLI:EU:C:2021:931, para 83. Therefore, such a decision of the minister for justice should be possible to be legally challenged in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the EUCFR.

¹¹⁸ Judgment of the Court (Grand Chamber) of 18 May 2021, joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, ECLI:EU:C:2021:393, para 199.

¹¹⁹ See judgment of the Court (Grand Chamber) of 20 April 2021 C-896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311 and for the Polish Supreme Court judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596, para 51.

¹²⁰ Judgment of the Court (Grand Chamber) of 19 November 2019, joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982, para 142.

¹²¹ Judgment of the Court (Third Chamber) of 9 July 2020, C-272/19, *VQ v Land Hessen*, ECLI:EU:C:2020:535, para 57.

A.K in order to check whether the Disciplinary Chamber of the Polish Supreme Court may be regarded as an independent court in the meaning of Article 19 (1)(2) TEU and Article 47 EUCFR.¹²² Moreover, in some of the preliminary rulings of the CJEU, one can furthermore see a clear indication as to whether the Court considers that a cumulative effect has occurred in a given case.¹²³ This certainly facilitates the assessment to be made later by the national courts.

Sixth, such a comprehensive examination of the legal situation in the Member State makes it possible for the Court to assess what the real purpose of the Member State's interference with judicial independence is. For example, it allows the Court to discover the actual purpose and motives of the national legislator, and not only to trust in the objectives of the concrete law declared by parliament during the legislative process or by the government in proceedings before the CJEU. The result of such an examination might be painful for the Member State in question. In the context of the case concerning the reduction of the retirement age of the judges sitting at the Polish Supreme Court, the Court stated that such a reduction was not backed by objectives of employment policy and the establishment of a more balanced age structure at the Supreme Court, but had possibly the aim of “side-lining a certain group of judges of that court”.¹²⁴ In the context of a case concerning the exclusion of judicial review of the procedure for the appointment of judges to the Polish Supreme Court, the CJEU declared that the activities of the national legislator possibly had the specific effect of “preventing the referring court from maintaining, after they have been made, requests for a preliminary ruling such as that which was initially referred in this case to the Court and thus of preventing the latter from ruling on such requests, and of precluding any possibility of a national court repeating in the future questions for preliminary rulings similar to those contained in the initial request for a preliminary ruling”.¹²⁵

Seventh, the CJEU declared that Article 19 (1)(2) TEU is directly effective.¹²⁶ The same applies to Article 47 EUCFR.¹²⁷ This means that these provisions provide national courts with an independent legal basis to safeguard judicial independence with the guarantees provided by the principle of effective judicial protection. The principle of direct effect allows also to apply the principle of primacy of EU law. That, in turn, enables national courts to set aside any national measures of a legislative, administrative or judicial character if they are infringing EU law. That is particularly helpful in a legal system which has been undergoing a rule of law crisis.

¹²² See judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596, paras 89-110.

¹²³ See e.g. judgment of the Court (Grand Chamber) of 6 October 2021 C-487/19, *Proceedings brought by W.Ż.*, ECLI:EU:C:2021:798, paras 152-153 or Judgment of the Court (Grand Chamber) of 19 November 2019, *Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982, para 152.

¹²⁴ Judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, *European Commission v Republic of Poland.*, ECLI:EU:C:2019:531, paras 81-82.

¹²⁵ Judgment of the Court (Grand Chamber) of 2 March 2021 C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2020:1053, paras 106-107.

¹²⁶ Judgment of the Court (Grand Chamber) of 2 March 2021 C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2020:1053, para 142.

¹²⁷ See e.g. Judgment of the Court (Grand Chamber) of 19 November 2019, *Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982, para 166.

In this way it is possible i.a. to dismantle the attempts of the national legislator to stop proceedings pending before a national court, to limit or even to exclude the possibility of judicial review of the nomination process for Supreme Court judges (normally available in the national legal system), or attempts to prevent a reference to the CJEU for a preliminary ruling under Article 267 TFEU.¹²⁸ A particularly strong mechanism emerging from the CJEU case law allows national courts to ignore the binding force of legal opinions or judgments of other judicial authorities and courts¹²⁹ (e.g. those higher up in the hierarchy) or, very importantly in the Polish context, of a Member State's constitutional court,¹³⁰ if this would force a national court to issue a decision infringing upon EU law or when the constitutional court is not an independent court established by law.¹³¹ Also, in several judgments, the Court advocated for the possibility that national courts may, on the basis of the combination of the principle of effective judicial protection and the principle of supremacy, “revive” old national legal regulations in a specific case. That is an instrument which allows national courts to fill lacunas in the system of legal protection when the disapplication of a national law would lead to a situation in which no national court would have jurisdiction to decide on a pending case.¹³² A very useful, although rarely used, instrument for national courts, is the possibility to suspend a national law for the duration of legal proceedings, in particular for the time of a reference to the CJEU for a preliminary ruling under Article 267 TFEU. Such a possibility has been shown by the CJEU’s rulings in cases 213/89 *Factortame*¹³³ and C-432/05 *Unibet*.¹³⁴ Moreover, it has also been applied by one of the panels of the Polish Supreme Court¹³⁵ in a situation where one of the judges sitting on that panel was affected by a reduction of the retirement age of judges, violating EU law.¹³⁶ The national court suspended the application of provisions lowering the retirement age of that judge for the duration of the proceedings and referred several questions to the CJEU under Article 267 TFEU.¹³⁷ This would have allowed the case to be completed by the same panel of the court which had referred the question for a preliminary ruling. Fortunately, after the Supreme Court initiated the preliminary ruling procedure, the

¹²⁸ Judgment of the Court (Grand Chamber) of 2 March 2021 C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2020:1053.

¹²⁹ Judgment of the Court (Grand Chamber), 15 January 2013, C-416/10 *Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, ECLI:EU:C:2013:8, paras 68-69.

¹³⁰ *Ibidem*, para 70.

¹³¹ See e.g. judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Criminal proceedings against PM and Others*, ECLI:EU:C:2021:1034, paras 242-243.

¹³² In relation to the jurisdiction of the courts see e.g. judgment in joined cases C- Judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, ECLI:EU:C:2019:982, para 166 or judgment of the Court (Grand Chamber) of 2 March 2021 C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others*, ECLI:EU:C:2020:1053, para 149.

¹³³ Judgment of the Court of 19 June 1990, 213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others*, ECLI:EU:C:1990:257.

¹³⁴ Judgment of the Court (Grand Chamber) of 13 March 2007, C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekansler*, ECLI:EU:C:2007:163.

¹³⁵ Order of the Polish Supreme Court, 2.08.2018 r. in case III UZP 4/18.

¹³⁶ Judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, *European Commission v Republic of Poland*, ECLI:EU:C:2019:531.

¹³⁷ Order of the Court (Third Chamber) of 29 January 2020. C-522/18 *DŚ v Zakład Ubezpieczeń Społecznych Oddział w Jaśle*, ECLI:EU:C:2020:42.

application of Polish provisions lowering the retirement age for Supreme Court judges were suspended by the CJEU in a temporary injunction issued in connection with an infringement case brought by the Commission.¹³⁸

Eighth, in cases concerning judicial independence the potential jurisprudential alliance between the ECtHR in Strasbourg and the CJEU in Luxembourg under Art. 52 (3) EUCFR might be very beneficial from the perspective of national courts. This is because the Strasbourg standard under Article 6 ECHR asserts itself, according to Article 52 (3) EUCFR it serves as a minimum standard for the interpretation and application of the principle of effective judicial protection in EU law. This in turn enables national courts to enforce the Strasbourg case-law through the mechanisms and instruments of EU law. Here, EU law, as a supranational legal order with its tools build around direct effect and primacy, offers, without doubt, far more effective mechanisms than the ECHR. Moreover, it is possible to supplement EU law with solutions created in ECtHR case-law in situations which are not yet covered by CJEU's jurisprudence. A good example of such interaction might arise between the Xero Flor¹³⁹ judgment of the ECtHR and the CJEU's judgment in joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Criminal proceedings against PM and Others.¹⁴⁰ It follows from the first judgment, that the so called "double judges" sitting at the Polish Constitutional Court do not meet the requirements of a court established by law under Article 6 ECHR. The second judgment shows that the decisions of a constitutional court are binding on the ordinary courts, provided that national law guarantees the independence of that constitutional court in relation, in particular, to the legislature and the executive. However, if national law does not guarantee such independence, a constitutional court is not able to ensure the effective judicial protection required by the second subparagraph of Article 19(1) TEU and therefore its rulings, contrary to EU law, would not be binding for other national courts.¹⁴¹ Following Xero Flor, it should be possible to use the principles of EU law to protect Polish citizens against the legal effects of judgments of the Constitutional Court handed down in a composition not corresponding to the demands of effective judicial protection.

And finally, ninth, the CJEU has equipped all national courts with a kind of "safety valve" under the treaties of the European Union, enabling them to react in a protective manner for individuals if the rule of law is systemically threatened in one of the Member States. Such an

¹³⁸ Order of the Court (Grand Chamber) of 17 December 2018, C-619/18 R, European Commission v Poland, ECLI:EU:C:2018:1021, paras 95-97. The CJEU gave then a judgment on the merits (Judgment of the Court (Grand Chamber) of 24 June 2019, C-619/18, European Commission v Republic of Poland., ECLI:EU:C:2019:531), in which, in principle, the Court of Justice resolved all substantive issues concerning the lowering of the age of retirement by the legislature, also with respect to the judges sitting on the panel of the SC which had initiated the preliminary ruling procedure in case C-522/18. As a result of the temporary injunction order, the Polish legislature introduced legislative changes by virtue of which it withdrew from lowering the age of retirement for sitting Supreme Court judges and introduced the legal fiction of their continuous holding of office.

¹³⁹ Judgment of the ECtHR in Xero Flor w Polsce sp. z o.o. v. Poland, Application no. 4907/18, 7 May 2021, ECLI:CE:ECHR:2021:0507JUD000490718.

¹⁴⁰ Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, Criminal proceedings against PM and Others, ECLI:EU:C:2021:1034, paras 229-230.

¹⁴¹ Ibidem, para 230.

instrument was identified by the CJEU in the C-216/18 LM judgment,¹⁴² where the role of national courts from outside the system where the rule of law problem has occurred, was revealed. The judgment in case C-216/18 LM came under the Framework Decision on the European Arrest Warrant (FDEAW),¹⁴³ within the judicial cooperation in criminal matters. This cooperation is located in the Treaties in the Area of Freedom, Security and Justice and makes it possible to create and maintain in the EU an area without internal borders.¹⁴⁴ In principle the FDEAW does not provide for the possibility of refusing to execute the European Arrest Warrant (EAW) except in the situations expressly indicated therein. These situations do not explicitly include violations of fundamental rights or other Article 2 TEU values.¹⁴⁵ This is the result of the presumption that each EU Member State shares with all other Member States - and assumes that those Member States share with it - the common values on which the Union is based, as clarified in Article 2 TEU.¹⁴⁶ The presumption that Member States respect the values of Article 2 TEU, including the rule of law, justifies trust in the legal systems of the Member States. In turn, this trust enables, among other things, the simplification of cross-border legal procedures, including judicial procedures. The EAW system is intended to be simpler and more efficient than traditional extradition procedures.¹⁴⁷ This is possible because the courts of the Member States trust that each state adheres to certain standards, making it possible to dispense with thorough and meticulous scrutiny of, for example, judicial decisions or the situation in the state to which a person would be transferred on the basis of an EAW. Thus, the CJEU had to decide in the C-216/18 LM case what effect a potential systemic problem concerning judicial independence, which is part of the principle of effective judicial protection protected by Article 19(1)(2) TEU and Article 47 EUCFR, has on the principle of mutual trust (recognition). The CJEU's ruling shows that such a systemic problem may lead to a limitation of trust in the legal system of a Member State and, more specifically, under the FDEAW, to the suspension of its execution (the court must refrain from giving effect to the EAW) - an effect not explicitly foreseen in the FDEAW.

Mutual trust between Member States is thus not 'blind' trust.¹⁴⁸ According to the CJEU, all mechanisms of cooperation between the courts of the Member States may function normally if there are no 'exceptional circumstances'.¹⁴⁹ These circumstances determine the limit of trust in a Member State's legal system. It is noteworthy, that the C-216/18 LM judgment refers directly to a mechanism already included in joined cases C-404/15 i C-659/15 PPU Aranyosi

¹⁴²Judgment of the Court (Grand Chamber) of 25 July 2018 C-216/18 PPU LM, ECLI:EU:C:2018:586; judgment of the Court (Grand Chamber) of 17 December 2020 joined cases C-354/20 PPU and C-412/20 PPU L and P, ECLI:EU:C:2020:1033; Judgment of the Court (Grand Chamber) of 22 February 2022, joined cases C- 562/21 PPU i C 563/21 PPU X and Y v Openbaar Ministerie, ECLI:EU:C:2022:100.

¹⁴³2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, p. 1–20.

¹⁴⁴ Judgment of the Court (Grand Chamber) of 25 July 2018 C-216/18 PPU LM, ECLI:EU:C:2018:586, para 36.

¹⁴⁵ See Articles Art. 4 i 4a FDEAW.

¹⁴⁶ Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para 168.

¹⁴⁷ Judgment of the Court (Grand Chamber) of 25 July 2018 C-216/18 PPU LM, ECLI:EU:C:2018:586, para 40.

¹⁴⁸ K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017), 54, Common Market Law Review, Issue 3, p. 805-840.

¹⁴⁹ Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para 191.

and Căldăraru.¹⁵⁰ In the latter judgment, the CJEU considered as exceptional circumstances concerning irregularities which are systemic or general: concerning certain groups of persons, or certain penitentiaries relating to the conditions of detention in the countries where the European Arrest Warrant was issued. Persons who were to be surrendered under the FDEAW could have been subjected to conditions of deprivation of liberty in violation of Article 4 EUCFR. Another example of this type of exceptional circumstance was formerly the systemic irregularities¹⁵¹ in asylum procedures and reception conditions in the country to which asylum seekers were to be transferred (Greece), pursuant to the Dublin II Regulation.¹⁵² These irregularities were of such a nature as to give rise to 'serious and demonstrable grounds for believing' that these persons might face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 EUCFR.¹⁵³

The Court's judgment in the C-216/18 LM case, which draws coherently on previous CJEU jurisprudence, may carry important implications for all instruments of cooperation between Member States that are based on mutual trust. The abrogation of this trust is possible in 'exceptional circumstances', and such a circumstance is also a systemic threat to one of the elements of the rule of law (effective judicial protection). As this regulatory mechanism is applied on the basis of primary law,¹⁵⁴ the potential for its application lies theoretically in all those cases in which the courts of the Member States may be confronted with the need to consider in their judgments the assessment of the legal situation, the evaluation of acts of application of law or the credibility of institutions originating from a problematic legal system of another Member State. Such a need is not uncommon in the Union's system. This may happen, *inter alia*, in case of cross-border administrative decisions, as part of the need for mutual recognition of standards in the EU internal market, in the field of competition law¹⁵⁵ or in the field of social security.¹⁵⁶

¹⁵⁰ Judgment of the Court (Grand Chamber) of 5 April 2016, joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, ECLI:EU:C:2016:198, paras 83 and 85. See G. Anagnostaras, Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: Aranyosi and Căldăraru, CMLRev. 2016/53(6), p. 1690.

¹⁵¹ Judgment of the Court (Grand Chamber) of 21 December 2011, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECLI:EU:C:2011:865, paras 89 and 94.

¹⁵² Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10 (not in force).

¹⁵³ Judgment of the Court (Grand Chamber) of 21 December 2011, N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECLI:EU:C:2011:865, paras 86, 94 and 106.

¹⁵⁴ The Court referred to Article 1 (3) FDEAW and held that the FDEAW does not have the effect of modifying the obligation to respect EU fundamental rights (enshrined in primary law), which also includes the principle of effective judicial protection established in Article 19 (1)(2) TEU and Article 47 EUCFR, which are a component of the value of the rule of law in Article 2 TEU.

¹⁵⁵ Judgment of the General Court (Tenth Chamber, Extended Composition) of 9 February 2022, T-791/19 Sped-Pro S.A. v European Commission, ECLI:EU:T:2022:67.

¹⁵⁶ Judgment of the Court (Grand Chamber) of 6 February 2018, C-359/16, Criminal proceedings against Ömer Altun and Others, ECLI:EU:C:2018:63.

4. Limits, Restrictions and Weak Points of the “Shield”

As can be seen from point 3 above, the “shield” for national courts, built on the principle of effective judicial protection and the value of the rule of law, is multi-layered and offers national judges many tools that can protect their independence from interference from the States’ executive and legislature. Nevertheless, such a “shield” has also its limits, restrictions, and weak points.

First, a significant obstacle to the use of the “shield” for defending the independence of national courts is the planned and systematically implemented aim of the Polish government to create a chilling effect on judges. The careers of Polish judges are fully dependent on the NCJ, which lacks independence from other state authorities, as it has been confirmed by the Strasbourg¹⁵⁷ and Luxembourg¹⁵⁸ case law. Judges who apply the rule of law jurisprudence of European courts in their work are subjected to disciplinary proceedings and criminal proceedings (on the basis of the so-called ‘muzzle law’¹⁵⁹), or are being transferred from their previous place of work to other divisions of a given court (e.g. after twenty years of adjudication in the criminal division, a judge is transferred to the labor law division¹⁶⁰). The result of such an intimidation is that only the most courageous judges decide to enforce European standards against the Polish State authorities. In such a situation, it is difficult to make use of the available tools based on EU law. The Strasbourg judgment of judge Waldemar Żurek may be seen as a good example in that regard.¹⁶¹ The ECtHR stated not only that Poland violated Article 6 (1) ECHR (right of access to court) and of Article 10 ECHR (freedom of expression), but also found that the accumulation of measures taken against judge Żurek – including his dismissal as spokesperson of a regional court, the audit of his financial declarations and the inspection of his judicial work – had been aimed at intimidating him because of the views that he had expressed in defense of the rule of law and judicial independence. In another case, concerning judge Paweł Juszczyszyn,¹⁶² the ECtHR found even that Poland violated Article 18 ECHR because the judge was held responsible for the content of his judicial decision in which he applied a European law standard concerning independent courts. The Court found that holding judge Juszczyszyn’s judicial decision to be the cause of a disciplinary offence which justified suspension from judicial duties had been contrary to the

¹⁵⁷ E.g. judgment of the ECtHR in Dolińska-Ficek and Ozimek v Poland, Applications nos. 49868/19 and 57511/19, 11 November 2021, CE:ECHR:2021:1108JUD004986819, paras 290 and 320.

¹⁵⁸ E.g. judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 European Commission v Republic of Poland, ECLI:EU:C:2021:596, 108.

¹⁵⁹ For details of the “muzzle law” see order of the Court (Grand Chamber) of 14 July 2021 C-204/21 R European Commission v Republic of Poland, ECLI:EU:C:2021:593.

¹⁶⁰ See <https://ruleoflaw.pl/judges-poland-harssment-transfer/> (last access 28.06.2023). See also judgment of the Court (Grand Chamber) of 6 October 2021 C-487/19, Proceedings brought by W.Ż., ECLI:EU:C:2021:798.

¹⁶¹ Judgment of the ECtHR in Żurek v. Poland, Application no. 39650/18, 16 June 2022, ECLI:CE:ECHR:2022:0616JUD003965018. Judge W. Żurek was spokesperson for the National Council of the Judiciary (NCJ), the constitutional body in Poland which safeguards the independence of courts and judges. In that capacity, he has been one of the main critics of the changes to the judiciary initiated by the legislative and executive branches of the new Government which came to power in 2015. The case concerned his removal from the NCJ before his term had ended, and his complaint that there had been no legal avenue to contest the loss of his seat. It also concerned his allegation of a campaign to silence him.

¹⁶² Judgment of the ECtHR in Juszczyszyn v. Poland, Application no. 35599/20, 6 October 2022, ECLI:CE:ECHR:2022:1006JUD003559920.

fundamental principles of judicial independence and the rule of law. The ECtHR stated also that the predominant purpose of the disciplinary measures taken against judge Juszczyszyn had been to sanction him and to dissuade him from assessing the status of judges appointed in a procedure involving the new NCJ.

Second, while defending judicial independence national judges must submit to the constraints imposed by the framework of the preliminary ruling procedure under Article 267 TFEU.¹⁶³ The decision of the CJEU's Grand Chamber in joined cases C-558/18 and C-563/18 *City of Łowicz*¹⁶⁴ shows those restraints well. Here, the CJEU was asked to answer two referrals of Polish judges who actively and publicly opposed the Polish 'judicial reforms'.¹⁶⁵ Those judges aroused an increased interest of the disciplinary officers subordinated to the Polish Minister for Justice and many disciplinary proceedings were initiated against them. From the CJEU they wished to obtain an answer on the compatibility with EU law of the disciplinary proceedings that were being conducted against them at the time they decided the cases from which the preliminary referrals emerged. These cases involved the Polish State as a party. The two national judges argued that the way the system of disciplinary responsibility in Poland was structured meant that the state authorities could exert pressure and a chilling effect on them, contrary to the guarantees for national courts under Article 19 (1)(2) TEU.¹⁶⁶ The support of the CJEU in preliminary rulings procedure would allow the referring national judges to determine whether they are in the position to issue a judicial decision under the conditions of independence as required by Article 19(1)(2) TEU. However, the Court found, that the orders for reference did not reveal that there is a connecting factor between a provision of EU law to which the questions referred for a preliminary ruling relate and the disputes in the main proceedings, and which makes it necessary to have the interpretation sought so that the referring courts may, by applying the guidance provided by such an interpretation, make the decisions needed to rule on those disputes. Thus, the CJEU concluded that the questions submitted by both national courts were of a general nature and did not concern interpretation of EU law which is objectively needed for the national court to give a judgment. The framework of the preliminary ruling procedure therefore did not allow the Court to give direct support to the referring national courts. The problem that arises in the background of those cases is, that these two judges were forced by the CJEU to obtain protection of their independence under Article 19(1)(2) TEU and Article 47 EUCFR, directly in proceedings in which they would already

¹⁶³ That problem, in the context of an ongoing rule of law crisis in Poland, has been pointed out by Advocate General Bobek in his opinion delivered on 17 June 2021, C-55/20, *Minister Sprawiedliwości v Prokurator Krajowy*, ECLI:EU:C:2021:500, para 146: "I acknowledge that such a division of responsibilities under the preliminary ruling procedure may not be ideal for dealing with altogether pathological situations in a Member State where the normal rules of legal interaction and proper dealings seem to be out of order. Realistically, however, the preliminary ruling procedure has inherent limitations in terms of its ability to resolve institutional disputes in such a specific context where one or more actors refuse to follow the indications given by the Court. In such cases, third-party intervention, and external enforcement of the Court's judgments under Articles 258 to 260 TFEU remain the more appropriate, if not the only, remedies."

¹⁶⁴ Judgment of the Court (Grand Chamber) of 26 March 2020, joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others*, ECLI:EU:C:2020:234.

¹⁶⁵ See point 1.

¹⁶⁶ Which in the end proved to be true - see judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 *European Commission v Republic of Poland*, ECLI:EU:C:2021:596.

face disciplinary sanctions.¹⁶⁷ However, in the C-432/05 Unibet judgment, the Court made it clear that if a person would be subjected to administrative or criminal proceedings or to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with EU law, that would not be sufficient to satisfy the principle of effective judicial protection. This statement raises an important question of whether it satisfies the requirements of effective judicial protection, when the CJEU directs national judges, who wish to defend their rights derived from Article 19 (1)(2) TEU under EU law, to receive that protection in disciplinary (penal) proceedings. That seems particularly unreasonable in a legal system, in which the rule of law is undermined, and the government tries to exert pressure on national judges.¹⁶⁸

Third, the use of the instruments of the "shield" based on direct effect and the principle of primacy offers great possibilities, but certain categories of rule of law violations just cannot be reversed by national courts only. In certain situations, legislative intervention may be indispensable and, in principle, may only be enforced by the European Commission through infringement proceedings under Article 258 TFEU and, in the event of non-compliance, by fines imposed on the basis Article 260 TFEU. An example here is the problem with the Polish Supreme Court's Disciplinary Chamber, which functioned until recently and did not meet the requirements of a court under Article 19 (1)(2) TEU and Article 47 EUCFR.¹⁶⁹ Here, the national courts, as is evident from the judgment in joined cases C-585/18, C-624/18 and C-625/18 A.K. and Others¹⁷⁰, were only allowed to disregard the national provisions granting jurisdiction to the Disciplinary Chamber so as not to transfer any cases there. However, national courts were not vested with the power to cure the situation and abolish the Disciplinary Chamber, which in the end was the task of the legislator. The same problem also applies to the NCJ, which is responsible for proposing candidates for judicial positions to the President of the Republic of Poland. From the fact that the NCJ is not an independent body, the national court may only draw conclusions for assessing the correctness of the judicial nomination process in the light of EU law, but it will not have the power to bring the NCJ into a composition that would comply with European standards and cure the judicial nomination process.

Fourth, the main weakness of the "shield" is the weakness of its enforcement by national institutions. During a rule of law crisis, a lot of state bodies, including courts, are being taken over or "packed" by authorities which are not interested in implementing rulings of

¹⁶⁷ Similarly, this issue has been approached by the judgment of the Court (Grand Chamber) of March 22, 2022, C-508/19 M.F. v J.M., ECLI:EU:C:2022:201. Here, too, the Court held that the question was inadmissible, inter alia, because, in principle, the question of the correctness of the composition of the disciplinary court should have been raised in the disciplinary proceedings.

¹⁶⁸ Even in the case of the City of Łowicz against the judges who asked a preliminary question on this account, the authorities initiated an investigation, which is the first stage of disciplinary proceedings. See Judgment of the Court (Grand Chamber) of 26 March 2020, joined Cases C-558/18 and C-563/18.

Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others, ECLI:EU:C:2020:234, para 54.

¹⁶⁹ See judgment of the Court (Grand Chamber) of 15 July 2021, C-791/19 European Commission v Republic of Poland, ECLI:EU:C:2021:596.

¹⁷⁰ Judgment of the Court (Grand Chamber) of 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, ECLI:EU:C:2019:982, para 166.

international tribunals, even if they are binding and unambiguous. In this regard, the authorities that caused the rule of law problem use their powers in order deliberately not to implement EU law and judgments of European courts. The situation in the Polish legal system after the CJEU judgment in joined cases C-585/18, C-624/18 and C-625/18 A.K. and Others¹⁷¹, in which the CJEU established the test of the independence and impartiality of a national court (here the Disciplinary Chamber of the Polish Supreme Court) can serve as an example for the differential or non-effective reception of EU standards of effective judicial protection set forth in Article 19 (1)(2) TEU and Article 47 EUCFR.

The findings made by the CJEU in joined cases C-585/18, C-624/18 and C-625/18 A.K. and Others were subsequently implemented by a resolution of 23 January 2020, adopted by the Supreme Court in the composition of the combined Chambers: Civil, Criminal and Labour and Social Security Chambers (“resolution of three chambers of the Supreme Court”),¹⁷² which was given the force of the legal principle (which means, that all judges of the Supreme Court were bound by it). This resolution was issued by the so called “old” judges of the Polish Supreme Court. In the resolution of the three chambers of the Supreme Court, the judges interpreted the provisions of the Polish civil and criminal procedure in such a way as to determine the consequences of the judgment in joined cases C-585/18, C-624/18 and C-625/18 A.K. and Others for all proceedings of this type in the Polish legal system. In respect to the “new” judges of the Supreme Court, the resolution of three chambers of the Supreme Court states, in line with the judgment in joined cases C-585/18, C-624/18 and C-625/18 A.K. and Others, that a court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure, or is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure, where the court formation includes a person appointed to the office of a judge of the Supreme Court with the participation of the unlawfully established NCJ. Moreover, the Supreme Court has resolved that the provided interpretation shall not apply to judgments given by courts before the decision date of the resolution and judgments to be given in proceedings pending at this date. However, it shall apply to judgments issued with the participation of judges of the Disciplinary Chamber of the Supreme Court irrespective of the date of such judgments.

After the resolution has been published, the legislative¹⁷³ and executive authorities immediately acted in order to nullify the effects of judgments handed down by the CJEU on the basis of Article 47 EUCFR and the resolution of three chambers of the Supreme Court. These actions included, inter alia, the initiation by the executive (Prime Minister or Minister for Justice, who is also the General Public Prosecutor) of proceedings before the Constitutional Tribunal. These procedures aimed at the exclusion of the possibility of application of standards

¹⁷¹ Judgment of the Court (Grand Chamber) of 19 November 2019, joined Cases C-585/18, C-624/18 and C-625/18 A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, ECLI:EU:C:2019:982.

¹⁷² Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court, 23 January 2020 r. (BSA I-4110-1/20); for the English language version see <http://www.sn.pl/aktualnosci/SitePages/Wydarzenia.aspx?ItemSID=602-0dc69815-3ade-42fa-bbb8-549c3c6969c5&ListName=Wydarzenia> (last access 28.06.2023).

¹⁷³ Restricting the applicability of the resolution of the 3 chambers of the Supreme Court implementing the CJEU case law also served as the purpose of the so-called “muzzle law”, which is the subject of the temporary injunction granted by the CJEU at the request of the European Commission in case C-204/21 R.

arising from the CJEU and ECtHR rulings thereby preventing Polish courts from checking the composition of national courts because of the way of appointment of judges in the flawed nomination procedure. In its ruling of 20 April 2020 (U 2/20¹⁷⁴) the Constitutional Tribunal declared that the resolution of the three chambers of the Supreme Court of 23 January 2020 was inconsistent with the provisions of the Constitution, Article 2 and Article 4 (3) TEU as well as with Article 6(1) ECHR and therefore is null and void. By judgment of 7 October 2021 (K 3/21¹⁷⁵), the Constitutional Tribunal ruled that the institutions of the EU, especially the CJEU, acted outside their competences granted to them, while the provisions of Article 19(1) TEU and Article 2 TEU are inconsistent with the Constitution to the extent to which they grant competences to national courts to disregard the provisions of the Constitution in the process of adjudication and grant competences to national courts to control the legality of the procedure for appointing a judge. In another judgement of 10 March 2022 (K 7/21¹⁷⁶), the Constitutional Tribunal declared Article 6(1) ECHR inconsistent with the Polish Constitution to the extent that it allows for the assessment of the procedure for the appointment of judges. Finally, in a judgment of 23 February 2022, following a legal question from a panel composed of 'new' Supreme Court judges (P 10/19¹⁷⁷), the Constitutional Tribunal declared unconstitutional statutory provisions of Polish law that provided grounds for exclusion of a judge due to circumstances related to the procedure of appointment of that judge by the President of the Republic of Poland on the motion of the NCJ.

The above-mentioned judgments of the Constitutional Tribunal aimed at questioning the competence of national courts to rule on the compatibility of the composition of Polish courts with Article 19 (1)(2) TEU and Article 47 EUCFR and therefore made in fact the effective application of EU law impossible. They excluded the principle of primacy of Union law, which is fundamental from the perspective of EU law, and directly aimed at excluding the possibility of application of CJEU and ECtHR judgments setting standards resulting from Article 19 (1)(2) TEU and Article 47 EUCFR for an independent judiciary. The judgments of the Constitutional Tribunal indicated above, in particular the one in case U 2/20, served also the "new judges" of the Supreme Court as a pretext for not applying the judgment in joined cases C-585/18, C-624/18 and C-625/18 A.K. and Others in the way it has been implemented by the resolution of the three chambers of the Supreme Court.¹⁷⁸ On the other hand, those formations of the Supreme Court that have been properly constituted in the light of European standards continue to consider the resolution of the three chambers of the Supreme Court to be binding.¹⁷⁹ Thus, depending on whether a case is decided by a "new" or an "old" formation of the Supreme Court, the resolution of the three chambers of the Supreme Court and the effects of Article 47 EUCFR will either be considered as non-binding or as binding.

¹⁷⁴ Judgment of the Constitutional Court of 20 April 2020 in case U 2/20.

¹⁷⁵ Judgment of the Constitutional Tribunal of 7 October 2021 in case K 3/21.

¹⁷⁶ Judgment of the Constitutional Tribunal of 10 March 2022 in case K 7/21.

¹⁷⁷ Judgment of the Constitutional Court of 23 February 2022 in case P 10/19.

¹⁷⁸ See e.g. order of the Supreme Court of 16 June 2021, I KO 6/21.

¹⁷⁹ See e.g. order of the Supreme Court of 16 September 2021, I KZ 29/21 or the resolution of 7 judges of the Supreme Court (Penal Chamber) of 2 June 2022, I KZP 2/22.

Conclusion

Emerging threats to the value of the rule of law in Article 2 TEU have triggered the EU legal order to create a “shield” build around Article 2 TEU values as the essence of the EU legal order and the principle of effective judicial protection (Article 19 (1)(2) TEU, Article 47 EUCFR). It has also been built on the basis of the strong possibilities of the EU supranational legal system, i.e. the principle of direct effect and the principle of primacy. However, such a shield has also its limits, restrictions, and weak points. These are primarily due, on the one hand, to the procedural limitations of the preliminary ruling procedure, which is the main interface of cooperation between the national courts and the CJEU, and, on the other hand, to the fact that, ultimately, EU law must be effectively implemented by national authorities. However, during an ongoing rule of law crisis, not all state authorities will always be interested in correctly and effectively implementing European standards, even if they have been established in binding CJEU or ECtHR rulings.

The Polish example of a rule of law problem is only an exemplification of the adaptive possibilities of EU supranational legal system. It may not be an exaggeration to say that Poland has become meanwhile a testing ground for the defense mechanisms that the supranational system of the European integration could use to protect itself from actions that harm its essence. Some authors in this connection argue that we may be witnessing a "constitutional moment".¹⁸⁰ This concept denotes a moment that has a fundamental impact on the path of future development of the constitutional order, in the absence of any formal changes to it. In light of the Court of Justice's jurisprudence, "the process of creating an ever-closer union between the peoples of Europe"¹⁸¹ within the supranational system of the EU flows first and foremost from the common European values adhered to by the Member States and shared by all Member States. Only now it will be decided whether the rule of law - as a value in Article 2 of the TEU - as this concept is understood in the Court's jurisprudence to date, will be defended. If it fails, the actions we are currently witnessing in Poland or Hungary, among others, will become an acceptable part of the EU legal order, and thus will co-evolve the understanding of the rule of law in EU law. The consequences of this could be rather irreversible changes to the EU legal system as we know it to date.

The CJEU's judgments invoking the value of the rule of law under Article 2 TEU show also that the Court wants to create barriers in the European Union's legal system to acts that pose a threat to that system. The CJEU clearly expressed its support for the protection of the supranational and autonomous legal system of the EU, for which the values mentioned in Art. 2 TEU are of key importance. The acceptance of these values by the Member States is indispensable for participation in the integration process since they form the identity the EU legal order. The refusal by a Member State to comply with the rule of law under Article 2 TEU is - in view of the content assigned to it by the CJEU so far, its character and its protective function for the legal system of the European Union - clearly linked to the challenge of the solidary and equal participation of this state in the process of the European integration. If we want to develop the EU as a "community of values", this goal can only be achieved within the

¹⁸⁰ A. von Bogdandy, P. Bogdanowicz, I. Canor, M. Taborowski, M. Schmidt, Guest Editorial: A potential constitutional moment for the European rule of law – The importance of red lines, CMLRev. 2018/55(4), p. 983.

¹⁸¹ Opinion of the Court (Full Court) of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, paras 165–167.

framework of sovereign States which equally respect the European values mentioned in Article 2 TEU.

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