Effects of the Rule-of-Law Crisis in the EU: Towards Centralization of the EU System of Judicial Protection

Aistė Mickonytė[*]

Abstract

This article examines the shift in the European Union (EU) system of judicial protection under Art. 19(1)(2) of the Treaty on European Union (TEU), as reflected by the European Court of Justice (ECJ) judgments *Associação Sindical dos Juízes Portugueses* (*ASJP*) and *Minister for Justice and Equality* (*LM*). Prior to the emergence of the rule of law crisis in Poland and Hungary, judicial independence served as one of the many requirements for a court seeking a preliminary ruling under Art. 267 of the Treaty on the Functioning of the European Union (TFEU). In *ASJP* and *LM*, the question of independence is seen as essential in determining whether a Member State respects its duty to guarantee effective judicial protection under Art. 19(1)(2) TEU, which gives expression to the rule of law under Art. 2 TEU. With those, the ECJ intervenes into the rule of law crisis, as its role under

[*] Dr., LL.M., scientist (post-doctoral research fellow) at the Russian East European Eurasian Studies Centre (REEES) of the Law Faculty of the University of Graz and a former Austrian Marshall Plan Foundation Fellow at Johns Hopkins University, Washington, D.C. (2018).

The author would like to take the opportunity to thank the anonymous referees for their very valuable and helpful comments.

Art. 7 TEU is limited. I argue that the Court's reasoning in *ASJP* places the entire national court organization under the scope of EU law, even in cases without a material link to EU law. I further claim that the expansive reading of Art. 19(1)(2) TEU moves the horizontal, decentralized system of judicial protection under EU law towards a more vertical, centralized relationship between the EU and national courts. The duty of the Member States to guarantee that their system of court organization meets the requirements of Art. 19(1)(2) TEU strengthens the idea that national law exists not parallel to but within the confines of EU law. However, the external boundaries of this Treaty provision remain unclear.

I. Introduction

The EU grapples with a long-standing rule of law[1] crisis concerning Poland's and Hungary's compliance with Art. 2 TEU.[2] The main point of contention concerns the Polish and Hungarian justice reforms, which arguably impair the independence of their respective judiciaries, a key element of the rule of law.[3] Violations of Art. 2 TEU by a Member State can trigger the sanctioning mechanism under Art. 7 TEU. Yet, by virtue of Art. 269 TFEU, the role of the ECJ in this sanctioning mechanism is limited to procedural questions. Instead of that, the Court emerged as an actor in this crisis by interpreting Art. 19(1)(2) TEU, which had previously enjoyed little attention in the Court's case law. The meaning of this provision, as it emerged at the backdrop of the rule of law dispute, constitutes the main theme of this contribution.

According to Art. 19(1)(2) TEU, "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." In the judgments *ASJP*[4] and *LM*[5] the ECJ places emphasis on the rule-

[1] The meaning of the "rule of law" is contested, but the European legal scholarship defines it as encompassing democracy, legal certainty, guarantees of judicial protection (including independent judiciary) and human rights, strong public institutions. See e.g. *A. von Bogdandy/M. Ioannidis*, Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done, CML Rev. 51 (2014), 59; *L. Pech*, The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper 04/09, (2009), 1, 22 ff., <http://www.jeanmonnetprogram.org> accessed 20.8.2019.

[2] In Hungary, constitutional reforms that led to allegations of the rule-of-law deficiencies started immediately after the formation of the coalition of the Fidesz and the Christian Democrats in 2011; in Poland, the disputed reforms began in 2015.

[3] See the overview on the next page and the sources cited therein.

[4] ECJ, Case C-64/16 *Associação Sindical dos Juízes Portugueses*, [2018] ECLI:EU:C:2018:117. This judgment concerns Portugal and thus is not directly related to Poland or Hun-

of-law dimension of judicial independence. In prior case law, the ECJ had interpreted the criterion of independence simply as one of the many conditions which had to be fulfilled by a national body seeking a preliminary ruling under Art. 267 TFEU. In recent judgments, this Treaty provision is interpreted as giving concrete expression to the obligation of the Member States to respect the rule of law. The independence criterion is now framed as the cornerstone of the principle of effective judicial protection under Art. 19(1)(2) TEU, which constitutes an indispensable element of the rule of law.

What makes the Court's interpretation of Art. 19(1)(2) TEU important is that, as it will be discussed, this Treaty provision seems to apply irrespective of whether the dispute concerned falls into the material scope of EU law. I will argue that the Court's reasoning in *ASJP* thus places the entire organization of the national judiciary under the scope of EU law. Since this appears to apply also in cases without a clear link to EU law, the scope of Art. 19(1)(2) TEU appears in need of further clarification, in particular in light of the currently decentralized system of judicial protection in the EU. I will suggest in this respect that the broad reading of this Treaty provision may contribute to an increased centralization of this system by placing the organization of national courts, as such, under supervision by the ECJ, thus advancing the vertical dimension in the relationship between the EU and the national courts.

To present the context of this apparent shift in the EU system of judicial protection, the rule of law dispute, which lends the backdrop for this development, should be reviewed. The dispute revolves around the Polish and Hungarian judicial reforms, which are widely seen as harming the independence of judges.[6] In scholarly discourses it has been argued[7] that these

---

gary. However, giving the timing and the reasoning of this judgment, it is meant to send a signal to other Member States that could be seen as breaching the duty of ensuring effective legal protection under Art. 19 (1)(2) TEU. For more, see Chapter 4.

[5] ECJ, Case C-216/18 PPU, *Minister for Justice and Equality*, [2018], ECLI:EU:C:2018:586.

[6] The Polish government made a number of invalid appointments to the Constitutional Tribunal and refused to publish some of its judgments. Nearly 40 % of the Supreme Court judges were forced into retirement; over 20 % of presidents and vice presidents of ordinary courts were dismissed. A new disciplinary chamber and a special appeals procedure before the Supreme Court were established, arguably targeting the independence of individual judges. For more, see *L. Pech/K. L. Scheppele*, Illiberalism Within: Rule of Law Backsliding in the EU, Cambridge Yearbook of European Studies 19 (2017), 3.

[7] Extensive body of literature examines the Hungarian and Polish reforms. See, e.g. *A. von Bogdandy/P. Bogdanowicz/I. Canor/M. Taborowski/M. Schmidt*, A Constitutional Moment for the European Rule of Law – Upcoming Landmark Decisions Concerning the Polish Judiciary, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-10, <https://papers.ssrn.com> accessed 20.8.2019; *T. Koncewicz*, The

reforms are incompatible with Art. 2 TEU,[8] since the independence of the judiciary, requiring courts to be protected from any pressures from the government, is an indispensable element of the rule of law.[9] As *Weiler* puts it,

> "[t]hough not perfect, one good measure of the rule of law is the extent to which public authorities in a country obey the decisions, even uncomfortable, of their own courts".[10]

This may be seen as an apt description of the situation in both Poland and Hungary.

Most controversially, the two Member States have been quite congruent in adopting legislation lowering the age of retirement of judges. The ECJ[11] and the European Court of Human Rights (ECtHR)[12] have handed down damning judgments regarding these laws; the Venice Commission[13] has criticized them heavily. In particular, it has been argued that these reforms endanger the security of tenure and irremovability of judges, which, in turn, impairs their independence.[14] Proceedings against Poland and Hungary are,

---

Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux, Rev. Cent. & E. Eur. L. 43 (2018), 116; *D. Kochenov*, The EU and the Rule of Law – Naïveté or a Grand Design?, in: M. Adams/A. Meuwese/E. Hirsch Ballin (eds.), Constitutionalism and the Rule of Law, 2017; *G. Halmai*, Second-Grade Constitutionalism? The Cases of Hungary and Poland, Eleven International Publishing, CSF – SSSUP Working Paper Series 1/2017, (2017), <https://papers.ssrn.com> accessed 20.8.2019; *M. Adams/A. Meuwese/E. H. Ballin* (eds.), Constitutionalism and the Rule of Law: Bridging Idealism and Realism, 2017; *C. Closa/D. Kochenov* (eds.), Reinforcing Rule of Law Oversight in the European Union, 2016; *K. L. Scheppele*, Autocratic Legalism, U. Chi. L. Rev. 58 (2018), 545; *M. Bankuti/G. Halmai/K. L. Scheppele*, From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions, in: G. A. Toth (ed.), Constitution for a Disunited Nation: On Hungary's 2011, 2012.

[8] Art. 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[9] ECtHR, *Agrokompleks v. Ukraine*, App. No. 23465/03, 6.10.2011, para. 136.

[10] *J. H. H. Weiler*, Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy, I.CON 12 (2014), 94.

[11] Case C-286/12 *Commission v. Hungary*, [2012] ECLI:EU:C:2012:687; Case C-288/12 *Commission v. Hungary*, [2014] ECLI:EU:C:2014:237. The ECJ pronounced the Hungarian scheme forcing judges into retirement to be contrary to EU law.

[12] *Baka v. Hungary* [Grand Chamber], App. No. 20261/12, 23.6.2016.

[13] See Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, Opinion No. 904/2017 (2017) CDL-AD(2017)031, <http://www.venice.coe.int> accessed 20.8.2019.

[14] Opinion No. 904/2017, Strasbourg, 11.12.2017, CDL-AD(2017)031, <http://www.venice.coe.int> accessed 20.8.2019. The security of tenure is considered one of the elements of

further, pending under the political sanctioning mechanism of Art. 7 TEU,[15] although the EU institutions have attracted criticism for acting too slowly.[16]

In parallel, the above-mentioned reforms have prompted the European Commission to launch infringement proceedings before the ECJ. In 2018, the Commission initiated the procedure under Art. 258 TFEU against Poland, claiming that the Polish Law on the Supreme Court violated Poland's obligations under EU law. The Court handed down its judgment on 24.6.2019, and it was unambiguous: The disputed Polish law was found to be incompatible with Poland's duties under Art. 19(1)(2) TEU. This decision was based on three aspects associated with the new law. *First*, the Court found that the lowering of the retirement age of the Supreme Court judges was not justified by a legitimate objective; hence, the principle of irremovability of judges was breached.[17] *Second,* the application of the new retirement age to judges appointed *before* the entry into force of this Polish law (3.4.2018) was found unlawful. *Third*, the discretion granted to the President of the Republic to extend the period of judicial activity of judges beyond the newly fixed retirement age was deemed to breach the principle of judicial independence as well.[18]

---

judicial independence. For the case law of the ECtHR on this matter, see *Campbell and Fell v. The United Kingdom*, App. No. 13590/88, 28.6.1984, para. 80; *Henryk Urban and Ryszard Urban v. Poland*, App. No. 23614/08, 30.11.2011, para. 45; *Fruni v. Slovakia*, App. No. 8014/07, 21.6.2011, para. 145; and *Brudnicka and others v. Poland*, App. No. 54723/00, 3.3.2005, para. 41.

[15] In December 2017, the Commission submitted to the Council a reasoned proposal under Art. 7(1) TEU to determine a clear risk of a serious breach by Poland of the values under Art. 2 TEU. In September 2018, the European Parliament also triggered Art. 7 TEU against Hungary. See European Commission, Rule of Law: European Commission Acts to Defend Judicial Independence in Poland, Press Release, Brussels, 20.12.2017, <http://europa.eu> accessed 20.8.2019. For details, see European Commission, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, 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, Brussels, 20.12.2017, COM(2017), 835 final, 2017/0360 (APP). For more, see *D. Kochenov*, Busting the Myths Nuclear: A Commentary on Article 7 TEU, EUI Working Papers, LAW 2017/10, (2017), <http://cadmus.eui.eu> accessed 20.8.2019, 6.

[16] *D. Kochenov/P. Bard*, Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement, Reconnect Working Papers (Leuven) No. 1, 4, (2018), <https://papers.ssrn.com> accessed 20.8.2019: "The European Union (EU) and the Member States seem to be doing as little as they can to combat rule of law backsliding in some of the EU's constituent parts. Each of the EU institutions came up with their own plan on what to do, inventing more and more soft law of questionable quality."

[17] ECJ, Case C-619/18 *Commission v. Poland*, [2019] ECLI:EU:C:2019:531, paras. 97 and 124.

[18] It is notable that upon request of the Commission, the ECJ also issued an interim order under Art. 160(7) of the Rules of Procedure, ordering Poland to suspend the application of

The Court rejected, in particular, the claim of Poland that the disputed measures have no link with EU rules. The Polish representatives argued that a review of national rules on the organization of the judiciary on the basis of Art. 19(1)(2) TEU was incompatible with the principle of conferral under Art. 5(1) TEU, since this area fell into the exclusive competence of the Member States rather than the domain of EU law.[19] The ECJ agreed that the organization of the judiciary falls into the realm of the Member States, yet the *exercise* of these competences has to be compatible with the obligations under EU law, including Art. 19(1)(2) TEU.[20] Since the Court's reasoning leaves the scope of Art. 19(1)(2) TEU fairly undetermined, this article aims to look into the ECJ case law on Art. 19(1)(2) TEU regarding the independence of the judiciary.

The author will seek to demonstrate how the judgments in *ASJP* and *LM* present the first actual interpretation of the substance of Art. 19(1)(2) TEU,[21] thereby possibly shifting the decentralized[22] system of judicial protection under EU law towards a more vertical, centralized framework. By framing Art. 19(1)(2) as an essential expression of the rule of law,[23] the Court positions judicial independence as one of the key preconditions for effective application of EU law. I will argue that in order to ensure that no national measures affecting the status of national judges escape scrutiny under EU law, the ECJ placed the entire court organization under the scope of EU law, irrespective of the existence of a material link with the *acquis*. It will be suggested that this expansive reading of Art. 19(1)(2) TEU moves the horizontal, decentralized system of judicial protection under EU law

---

the disputed law. See ECJ, Order of the Vice-President of the Court in Case C-619/18 R *Commission v. Poland*, [2018] <https://curia.europa.eu> accessed 20.8.2019. For more, see *D. Sarmiento*, Interim Revolutions, (22.10.2018), <https://verfassungsblog.de>.

19 Moreover, the disputed domestic measures could not be reviewed under Article 47 CFREU either, as these measures did not implement EU law in light of Article 51(1) CFREU. See *Commission v. Poland* (note 17), paras. 37-41.

20 *Commission v. Poland* (note 17), para. 52, and the cases cited therein: Case C-247/17 *Raugevicius*, [2018] EU:C:2018:898, para. 45, and Joined Cases C-202/18 and C-238/18 *Rimšēvičs and ECB v. Latvia*, [2019] EU:C:2019:139, para. 57.

21 *T. von Danwitz*, Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ, Speech at King's College London, 2.3.2018, 10, <https://www.kcl.ac.uk> accessed 20.8.2019.

22 *C. Calliess/M. Ruffert* (eds.), EUV/AEUV, 6th ed. 2016, para. 47; *R. Schütze*, Takis Tridimas, Oxford Principles of European Union Law, Volume 1: The European Union Legal Order, 2018, 583.

23 The ECJ tied the principle of effective judicial protection to the rule of law, holding that "effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law" and that "Article 19 TEU, […] gives concrete expression to the value of the rule of law stated in Article 2 TEU". See *Associação Sindical dos Juízes Portugueses* (note 4), paras. 32, 36.

towards a more vertical, centralized relationship between the EU and national courts. The duty of the Member States to organize their judicial bodies according to EU rules and principles strengthens the idea that national law exists not parallel to but within EU law. Yet, the external boundaries of Art. 19(1)(2) TEU remain fairly undefined. Against the background of Art. 4(2) TEU, which embodies the EU's duty to respect the national identity of the Member States pertaining to their fundamental political and constitutional structures, I will suggest that it is important to further clarify the scope of this provision in subsequent case law of the ECJ.

The article will be structured as follows: Chapter 2 will discuss Art. 19(1)(2) TEU and the Union's decentralized system of judicial protection. Then, in Chapter 3, I will consider the development of the independence criterion in the case law of the ECJ, also touching upon the ECtHR jurisprudence. Chapter 4, which will feature the centerpiece of this article, will look into the apparently changing role of the independence criterion, as illustrated by the *ASJP* and *LM* judgments. The aim will be, further, to examine the emerging scope of Art. 19(1)(2) TEU, also drawing parallels with other case law, including the landmark judgment *Dassonville*.[24] Finally, in Chapter 5, I will reflect on the potential implications of the recent ECJ judgments for the EU model of judicial protection and will draw corresponding conclusions.

II. The Decentralized System of Judicial Protection Under Art. 19(1)(2) TEU

The law of the EU rests on the system of judicial protection formulated in Art. 19 TEU, which embodies the principle of the rule of law.[25] Art. 19(1)(1) TEU lays down the duty of the ECJ "to ensure that in the interpretation and application of this Treaty the law is observed", thus entrusting the Court with the task of judicial control. This establishes the monopoly of the ECJ on the interpretation of EU law.[26] According to the ECJ, the EU system of judicial protection entails a complete system of legal remedies,[27] designed to ensure that neither the Member States nor the EU institutions can avoid a review of the question whether the measures adopted by them

[24] ECJ, Case C-8/74, *Dassonville*, [1974] ECLI:EU:C:1974:82.
[25] *Commission v. Poland* (note 17), para. 47. See also *L. Pech* (note 1).
[26] *T. Lock*, The European Court of Justice and International Courts, 2015, 80 et seq.
[27] ECJ, Case C-294/83, *Les Verts*, [1986] ECLI:EU:C:1986:166, para. 23.

comply with EU law.[28] This system is embodied in a complex system of judicial protection comprised, in particular, of the infringement procedure under Art. 258 TFEU, the preliminary ruling procedure under Art. 267 TFEU and the action for annulment in Art. 263 TFEU.

In addition, Art. 19(1)(2) TEU carves out a key role for the Member States in implementing EU law, by conferring upon them the duty to guarantee effective judicial protection in fields covered by EU law. The principle of effective judicial protection forms part of the general principles of EU law, corresponding to the national constitutional traditions of the Member States as well as Arts. 6 and 13 European Convention on Human Rights (ECHR).[29] The duty of the Member States to guarantee effective judicial protection serves a two-fold purpose: In addition to safeguarding individual rights, it serves in particular to ensure uniform interpretation and application of EU law.

Thereby Art. 19(1)(2) TEU entrusts national courts with a key duty of implementing EU law; together with the preliminary ruling procedure under Art. 267 TFEU, which is based on cooperation between the ECJ and national courts, Art. 19(1)(2) TEU thus establishes a cooperation-based model of judicial protection.[30] This model perceives domestic courts as the "guardians of [EU] legal order",[31] although the ECJ alone is competent to authoritatively interpret EU law, in order to protect its autonomy and uniformity.[32]

This model can be seen as decentralized. In practice the ECJ is not the primary venue for the application of EU law, despite holding the monopoly of interpretation.[33] Due to the highly limited *locus standi* of natural and legal persons before the EU Courts under Art. 263(4) TFEU,[34] EU law is

---

[28] *B. Wegener*, EU-Vertrag (Lissabon) Art. 19 [Gerichtshof der Europäischen Union] in: C. Calliess/M. Ruffert (eds.), EUV/AEUV, 5th ed. 2016, para. 42.

[29] *B. Wegener* (note 28), para. 41; see also the case law cited therein, e.g. ECJ, Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECLI:EU:C:1986:206, para. 18: "The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 [ECHR]."

[30] *T. Jaeger*, Gerichtsorganisation und EU-Recht: Eine Standortbestimmung, EuR 53 (2018), 611, 616.

[31] ECJ, Opinion 1/09, [2011] ECLI:EU:C:2011:123, para. 66.

[32] Opinion 1/09 (note 31), para. 67.

[33] *G. A. Bermann*, A Restatement of European Administrative Law: Problems and Prospects, in: S. Rose-Ackerman/P. L. Lindseth (eds.), Comparative Administrative Law, 2013, 595, 601.

[34] For more, see e.g. *M. van Wolferen*, The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework, Journal of Contemporary European Research 14 (2016), 914.

primarily applied by domestic courts. Even the defining features of the *acquis*, ranging from the direct effect[35] and supremacy[36] of EU norms to the liability of the Member States for breaches of EU law,[37] or the *acte clair* doctrine,[38] were developed after a national court stayed the domestic proceedings to request the ECJ for an interpretation of the *acquis* in line with Art. 267 TFEU. Notably, this provision gives national courts some discretion in deciding whether to refer a question to the ECJ.[39]

By contrast, the action of annulment under Art. 263(4) TFEU, which sets a particularly high standard for bringing an action,[40] does not constitute the primary venue for applying EU law. Yet the difficulty to achieve *locus standi* under the action for annulment can be justified only if there are actual effective remedies available before national courts.[41] The decentralized model of judicial protection under Art. 19(1)(2) TEU therefore compensates (or should compensate) for the limited possibilities to bring an action before the EU Courts.[42] By acting as "Union courts" to ensure effective application of EU law, national courts further express the duty of sincere cooperation of the Member States under Art. 4(3) TEU.[43] The practical achievement of the ECJ's task as the EU's supreme adjudicator, therefore, is closely linked to the commitment of the Member State courts to their role as "Union courts".

---

35 ECJ, Case C-26/62 *Van Gend en Loos*, [1963] ECLI:EU:C:1963:1.

36 Case C-6/64 *Costa v. E.N.E.L.*, [1964] ECLI:EU:C:1964:66.

37 ECJ, Case C-6/90 *Francovich und Bonifaci*, [1991] ECLI:EU:C:1991:428.

38 ECJ, Case C-283/81 *CILFIT*, [1982] ECLI:EU:C:1982:335.

39 Art. 267 TFEU provides that "[a national] court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon". This discretion does not apply, when a national court believes that an EU act may be incompatible with the Treaties. In that case, the court has to request a preliminary ruling. See ECJ, Case C-314/85 *Foto-Frost*, ECLI:EU:C:1987:452, paras. 13 et seq.

40 ECJ, Case C-25/62 *Plaumann*, [1963] ECLI:EU:C:1963:17, 99 et seq.

41 *B. Wegener* (note 28), para. 42.

42 ECJ, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, [2013] ECLI:EU:C:2013:625, paras. 92, 99 ("As regards the role of the national courts and tribunals, […], it must be recalled that the national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed"), 102 ("in the absence of European Union rules governing [legal remedies], it is for the domestic legal system of each Member State to designate [...] the courts and tribunals with jurisdiction and to lay down the detailed procedural rules governing actions brought to safeguard rights which individuals derive from European Union law").

43 *T. Jaeger* (note 30), 650.

Until now, it seemed that Art. 19(1)(2) TEU did not prejudice domestic rules on the organization of the judiciary, or left them unaffected,[44] as the wording of this provision is silent on any procedural and institutional aspects.[45] This bears resemblance to the principle of national procedural autonomy,[46] although it should be noted that the principles of equivalence and effectiveness limit the discretion of the Member States in this regard.[47] If one considers Art. 19(1)(2) TEU in relation to judicial independence, the Court's early case law relating to independence did not mention this Treaty provision at all. Rather, it focused on independence as one of the many characteristics of a "court" within the meaning of Art. 267 TFEU, as discussed below.

III. Judicial Independence in the Context of Art. 267 TFEU

The role of the national courts, as the guardian of EU law, has evolved primarily within the preliminary ruling procedure.[48] It is, thus, unsurprising that the EU concept of judicial independence also emerged in this very context. The preliminary ruling is the primary instrument of cooperation between the ECJ and national courts, intended to guarantee uniform application of EU law and, indirectly, to safeguard individual rights under EU law.[49] Precisely within this procedure, an autonomous concept of a "court or tribunal" for the purposes of Art. 267 TFEU has been developed.[50] Ac-

[44] *C. Gaitanides*, EUV Art. 19 [Europäischer Gerichtshof], in: H. von der Groeben/J. Schwarze/A. Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, para. 60.

[45] *C. Gaitanides* (note 44), para. 60.

[46] ECJ, Case C-33/76 *Rewe v. Landwirtschaftskammer für das Saarland*, [1976] ECLI:EU:C:1976:188, para. 5: "[I]n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law […]". For a critical account on the existence (or lack thereof) of the procedural autonomy, see *M. Bobek*, Why There Is No Principle of "Procedural Autonomy" of the Member States, in: H.-W. Micklitz/B. De Witte (eds.), The European Court of Justice and the Autonomy of the Member States, 2012, 305.

[47] *Inuit Tapiriit Kanatami and Others v. Parliament and Council* (note 42), para. 102 and the cases cited therein. See also e.g. *K. Havu*, Adequate Judicial Protection and Effective Application of EU Law in the Context of National Enforcement, Remedies and Compensation, 2015. Final version in Contemporary Readings in Law and Social Justice, Helsinki Legal Studies Research Paper No. 37, <https://papers.ssrn.com> accessed 20.8.2019.

[48] *R. Baratta*, National Courts as "Guardians" and "Ordinary Courts" of EU Law: Opinion 1/09 of the ECJ, Legal Issues of Economic Integration 38 (2011), 297.

[49] *B. Wegener*, AEUV Art. 267 (ex-Art. 234 EGV) [Vorabentscheidung], in: C. Calliess/M. Ruffert (note 28), paras. 1-2.

[50] *B. Wegener* (note 49), para. 19.

cording to this concept, a national body in question has to be established by law; it has to be permanent; its jurisdiction has to be obligatory; it must apply the rule of law; and it has to be independent.[51] Only a body that satisfies the above criteria, is a court within the meaning of Art. 267 TFEU and, thus, may invoke the preliminary-ruling procedure.[52] Before the rule of law crisis, hence, the independence criterion figured in the case law of the ECJ primarily as one of the conditions a national body had to meet in order to request a preliminary ruling.

The meaning of the independence criterion is fleshed out in several judgments. To illustrate, in *Wilson*,[53] judicial independence is defined through an internal and an external aspect. The internal one concerns the impartiality of the adjudicatory body, the requirement to be objective and free of any interest in the result of the proceedings other than the application of the law, so that the interests of the parties to the proceedings can be protected in a level playing field. The external aspect requires the court to be "protected against external intervention or pressure liable to jeopardize the independent judgment of its members as regards proceedings before them", which includes "guarantees against removal from office".[54] To safeguard both aspects of independence, a Member State bears the duty to adopt rules regarding "the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members".[55] In *Margarit Panicello*, furthermore, the Court elaborated the external criterion of independence, adding the capacity of a given court to adjudicate

> "wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever".[56]

---

[51] ECJ, Case C-465/11 *Forposta*, [2012] ECLI:EU:C:2012:801, para. 17; Case C-54/96 *Dorsch*, [1997] ECLI:EU:C:1997:413, para. 23 and the case law cited therein. Although *Dorsch* indicates that the procedure before a national court must be "inter partes", in other case law the ECJ deems it not a necessary condition for a court within the meaning of Article 267 TFEU. See also Case C-18/93 *Corsica Ferries*, [1994] ECLI:EU:C:1994:195, para. 12; ECJ, Case C-196/09 *Paul Miles and Others*, [2011] ECLI:EU:C:2011:388, para. 37 and the judgments cited therein; ECJ, Case C-14/86 *Pretore di Salo*, [1987] ECLI:EU:C:1987:275, para. 7.

[52] *Associação Sindical dos Juízes Portugueses* (note 4), para. 43; *Minister for Justice and Equality* (note 5), para. 54: "[The preliminary ruling mechanism] may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence."

[53] ECJ, Case C-506/04 *Wilson*, [2006] ECLI:EU:C:2006:587, paras. 50-52 and the case law cited therein.

[54] *Wilson* (note 53).

[55] *Wilson* (note 53), para. 53.

[56] ECJ, Case C-503/15 *Margarit Panicello*, [2017] ECLI:EU:C:2017:126, para. 37 and the case law cited therein.

Despite this detailed description of independence, some cases suggest that the Court has applied a relatively lenient threshold regarding the term "court". This approach served to enable a broad range of national bodies to request a preliminary ruling. In *Pretore di Salo*, for instance, the Court considered whether a magistrate for the district of Salo in Italy constituted a court for the purposes of Art. 267 TFEU. Under Italian law, a Praetor (*Pretore*) performs the tasks of a public prosecutor and an examining magistrate who conducts preliminary investigations in the capacity of a public prosecutor and adopts an order in the capacity of an examining magistrate, if there are no grounds for continuing the proceedings.[57] This order does not constitute a judicial act, as it does not have the force of *res judicata*, does not create irreversible legal consequences, and it does not have to state reasons. By contrast, Art. 111 of the Constitution of Italy explicitly imposes the duty to state reasons with regard to every judicial act.[58] Despite a certain conflation of functions typical for a public prosecutor and a judge, the ECJ held that a *Pretore* could be considered a court under Art. 267 TFEU, "even though certain functions of that court or tribunal in the proceedings […] are not, strictly speaking, of a judicial nature".[59]

In *Dorsch,* similarly, an argument was raised that the Federal Supervisory Board (*Vergabeüberwachungsausschuß*) of Germany, an authority entrusted with the supervision of public service contracts, did not constitute a court within the meaning of Art. 267 TFEU, because *inter alia* it was not independent.[60] Organizationally, the Board was linked to the Federal Cartel Office (*Bundeskartellamt*), which itself is supervised by the Ministry of Economic Affairs of Germany. In addition, the term of office of the chair of the Board as well as that of the official assessors was not fixed and the rules regarding impartiality applied only to the lay members of the Board. Nonetheless, the Court qualified the Board as a court, with reference to Germany's Budget Principles Law (*Haushaltsgrundsätzegesetz*), which provided that the Board carried out its tasks independently and under its own responsibility.[61] Satisfied with reiterating the wording of this national law, the ECJ did not further inquire into the independence of this authority.

The concept of judicial independence was, thus, interpreted rather flexibly, in order to facilitate the primary objective of Art. 267 TFEU, that is to ensure uniform application of EU law by allowing a large number of bodies

57 *Pretore di Salo* (note 51), para. 6.
58 Art. 111 of the Constitution of Italy: "[…] All judicial decisions shall include a statement of reasons. […]".
59 *Pretore di Salo* (note 51), para. 7.
60 *Dorsch* (note 51), para. 34.
61 *Dorsch* (note 51), para. 35.

to seek the ECJ's counsel.[62] It should be noted that the above-mentioned cases did not raise issues of fundamental rights or systemic deficiencies in the judicial systems of the Member States. Instead, in these cases, the ECJ had to consider the independence criterion solely as a matter of establishing its own jurisdiction in the case concerned. Having regard to the aim of Art. 267 TFEU, a less strict approach seems reasonable and apt to achieve the objectives of the Treaty.

To compare, the ECtHR considers independence in a context concerning fundamental rights. Undoubtedly Strasbourg and Luxembourg define the features of judicial independence in a similar manner.[63] However, the rationales guiding the two Courts are somewhat different. The ECtHR adjudicates on judicial independence not as a matter of jurisdiction, but in the context of the right to a fair trial under Art. 6(1) ECHR, arguing that judicial independence is a prerequisite for the rule of law.[64] Key importance of the independent judiciary for the protection of fundamental rights presupposes a strict judicial review. As a result, a violation of this criterion leads to a breach of the State's obligation under the Convention.

By contrast, since the ECJ referred to independence among other characteristics of a court for the purpose of establishing its own jurisdiction, no negative consequences occurred when the national body was found not to meet the criterion of independence, as in *Margit.*[65] It simply meant that the authority concerned did not constitute a court and, consequently, the ECJ was not competent to accept its request for a preliminary ruling.[66]

The ECJ judgments in *ASJP* and *LM*, however, mark a turn in regard to the context in which the ECJ considers the independence of the judiciary. The Court applies the independence criterion in a setting that is more closely linked to the ECtHR approach, that is the context of judicial protection as a fundamental right. In that respect, failing to meet the criterion of inde-

---

62 *M. Bonelli/M. Claes*, Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses, Eu Const. L. Rev. 14 (2018), 622 et seq., 638. See also *B. Wegener* (note 49) para. 1. See also ECJ, Case 166/73 *Rheinmühlen Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] ECLI:EU:C:1974:3, para. 2.

63 See ECtHR, *Findlay v. the United Kingdom,* App. No. 22107/93, 25.2.1997, para. 73, which refers to the following criteria of independence: "the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence". See also *Bryan v. the United Kingdom*, App. No. 9178/91, 22 November 1995, para. 37; *Langborger v. Sweden*, App. No. 11179/84, 22 June 1989, para. 32.

64 *Agrokompleks v. Ukraine* (note 9), para. 136.

65 *Margarit Panicello* (note 56), para. 36.

66 *Margarit Panicello* (note 56), para. 43.

pendence is associated with clearly negative consequences, as the Member State in question is pronounced to have breached its basic obligations under EU law.

IV. The Changing Role of Judicial Independence: The *ASJP* and *LM* Judgments

1. The *ASJP* Judgment: Broad Scope of Art. 19(1)(2) TEU

The *ASJP* judgment of 2018 temporally coincides with the rule of law crisis, but it does not actually concern Poland or Hungary. Although the case deals with Portuguese austerity measures concerning salary cuts of Portuguese judges, the Court used it as an opportunity to elaborate on a question of vital importance to the rule of law crisis, that is the basis in EU law for demanding the Member States to safeguard judicial independence. In this preliminary ruling, the Court measured the Portuguese rules against the benchmark of Art. 19(1)(2) TEU, inquiring into whether they infringed the independence of the judiciary. By emphasizing that the organization of domestic courts is not solely a matter of national regulation, the Court also implicitly cautioned the Member States whose reforms impair judicial independence that their regulation would not escape legal scrutiny.[67]

The measures that gave rise to the referring court's questions had no explicit link with EU law, as the Portuguese government reduced the judges' salaries based on a domestic law. Nonetheless, the Court held that dispute fell within the material scope of Art. 19(1)(2) TEU, whose scope is limited to "the fields covered by Union law". To establish a link with this Treaty provision, the Court deemed it irrelevant whether the Member State was implementing EU law within the meaning of Art. 51(1) Charter of Fundamental Rights of the European Union (CFREU).[68] This expansive reading of Art. 19(1)(2) TEU reflects the idea that any national court may potentially be seized to apply EU law; accordingly, any court in any situation, irrespective of a specific link to EU law, must meet the requirement of inde-

[67] The Polish government has claimed that the court organization falls exclusively into the domestic realm. For a critical account on this claim, see *K. L. Scheppele/L. Pech*, Is the Organisation of National Judiciaries a Purely Internal Competence?, (4.3.2018), Verfassungsblog.de <https://verfassungsblog.de> accessed 20.8.2019. For more on Poland's claim, see: Poland Will Not Yield to EU Over Court Reforms – Kaczynski, Reuters (26.1.2018), <https://uk.reuters.com> accessed 20.8.2019.

[68] *Associação Sindical dos Juízes Portugueses* (note 4), para. 29.

pendence, as to fulfil the obligations under Art. 19(1)(2) TEU. This brought "the entire national judicial organization"[69] under the scope of EU law, suggesting that Art. 19(1)(2) TEU can be invoked in the absence of a material link with EU law.[70] This interpretation of the Court implies a purposive reading of Art. 19(1)(2) TEU, as a narrower interpretation of the scope of this provision could allow national measures concerning the judiciary escape scrutiny under EU law. However, effective judicial review being an essential part of the rule of law,[71] it is crucial to ensure that the Member States observe their duties in this regard.

The purpose of this interpretation is evident, but at the same time it raises questions regarding the Court's understanding of the scope of EU law. As noted above, in *ASJP* the ECJ considered that Art. 19(1)(2) TEU could apply irrespective of whether the Member State was implementing EU law within the meaning of Art. 51(1) CFREU.[72] However, in *Akerberg Fransson*, the Court had established that the scope of application of the Charter *could not be narrower than the scope of EU law*, to ensure that "situations cannot exist which are covered [by EU] law without […] fundamental rights being applicable".[73] It would, hence, appear that in *ASJP* the ECJ seems to introduce an understanding of the scope of EU law that may be broader than that of the Charter.[74]

In this particular case, the ECJ found no violation of EU law since the austerity measures were not aimed specifically at judges; instead, it was considered a general measure whose aim was to facilitate the contribution of the entire public administration apparatus to the austerity effort, based on the mandatory requirements for decreasing Portugal's budget deficit.[75] The importance of this case lies, however, in the way the ECJ elaborated, for the first time, the scope of Art. 19(1)(2) TEU. The Court instrumentalized Art. 19(1)(2) TEU to create what one may call a "functional" scope of EU law,

69 *M. Bonelli/M. Claes* (note 62), 623.

70 See e.g. *L. Pech/S. Platon*, Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical dos Juízes Portugueses, EU Law Analysis (13.3.2018) <http://eulawanalysis.blogspot.com>; *M. Ovadek*, Has the CJEU Just Reconfigured the EU Constitutional Order?, (28.2.2018), Verfassungsblog.de, <https://verfassungsblog.de> accessed 20.8.2019.

71 *Associação Sindical dos Juízes Portugueses* (note 4), para. 36. See also ECJ, Case C-72/15 *Rosneft*, [2017] ECLI:EU:C:2017:236, para. 73; C-562/13 *Abdida*, [2014] EU:C:2014:2453, para. 45; C-362/14 *Schrems*, [2015] EU:C:2015:650, para. 95.

72 *Associação Sindical dos Juízes Portugueses* (note 4), para. 29.

73 ECJ, Case C-617/10 *Akerberg Fransson*, [2013] ECLI:EU:C:2013:105, para. 21.

74 *M. Bonelli/M. Claes* (note 62), 630.

75 *M. Bonelli/M. Claes* (note 62), 48.

which may not necessarily overlap with the material one, as argued by *Bonelli* and *Claes*.[76]

2. A "Functional" Scope of EU Law: Parallels with *Dassonville*

One could argue that this broad interpretation of Art. 19(1)(2) TEU is fully consistent with prior case law of the ECJ, which provides that the Member States are obliged to respect EU law also in areas which are *not* governed by EU law but which fall "within the scope *ratione materiae* of European Union law".[77] In other words, in the exercise of their competences, the Member States have to respect EU law even if the latter does not regulate the situation at hand.[78] To be fair, the precise meaning of this statement is not quite clear. After all, if the exercise of a national competence has to be compatible with EU law, it could be argued that the disputed area of regulation is, in practice, nonetheless affected by the rules of the Union. Precisely according to the "scope *ratione materiae*" reasoning, the dispute that gave rise to the *ASJP* case was deemed to fall into the scope of EU law: It fell into the scope of EU law not because it concerned matters governed by EU rules as such, but because a Member State exercising its competences pertaining to the organization of its court system has to respect EU rules on judicial independence. The observance of EU law in this case is all the more important since national courts act as Union courts in implementing EU law and, in this particular function, have to ensure effective judicial review.[79]

One could call this a functional approach to the scope of EU law: In their function as Union courts, national courts have to meet the requirements of EU law. Thus, it could be argued that the *ASJP* judgment expanded the scope of EU law beyond the confines of Art. 51(1) CFREU to make sure that the function, or role, of national courts as Union courts is not impaired. The external boundaries of this scope are not yet clear, however. Would any question of court organization in a Member State fall into the scope of Art. 19(1)(2) TEU? It is likely to be the case, if this question might be seen by the ECJ as affecting the duty of the Member States to ensure effective judicial protection.

---

76 *M. Bonelli/M. Claes* (note 62), 631.

77 ECJ, Case C-391/09 *Runevič-Vardyn and Wardyn*, [2011] ECLI:EU:C:2011:291 para. 62.

78 *Commission v. Poland* (note 17), para. 52.

79 *M. Bonelli/M. Claes* (note 62), 631.

In this light, the *ASJP* judgment is a continuation of the effectiveness-driven jurisprudence of the ECJ, which led to such landmark judgments as *Dassonville*. In the *ASJP*, just like in *Dassonville,* the ECJ judges displayed a remarkable ability to think innovatively. To recall, in *Dassonville*, the Court extended the notion of a measure equivalent to quantitative restrictions (MEQR) under Art. 34 TFEU to "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[80] At the time, this was a revolutionary judgment, which established that also equally applicable national measures could be unlawful if they have an indirect or potential effect on the cross-border trade. After the other leading judgment *Cassis de Dijon* confirmed the expansive reading of the scope of EU provisions to advance integration in the absence of harmonization,[81] European traders began contesting virtually *any* national rule as an unlawful under Art. 34 TFEU. The ECJ attempted to limit the scope of a MEQR in *Keck*,[82] but this does not seem to have narrowed down the scope of Art. 34 TFEU in the long term.[83]

Parallels can be drawn between these landmark judgments on the free movement of goods and the *ASJP* case. They all illustrate the ECJ's effort to deploy expansive reading of the Treaty to advance a fundamental objective of the EU. *Dassonville* and *Cassis* signify attempts to advance the establishment of the internal market in the absence of harmonization measures. Meanwhile the *ASJP* judgment was adopted at the time when the EU was – and seemingly is – incapable of resolving a nearly decade-long rule of law crisis. This judgment implies an intent of the ECJ to warn Poland and potentially other Member States that their court systems are not outside the purview of EU law. Hence, national rules affecting judicial independence can be reviewed by the ECJ even if Art. 47 CFREU, which concerns the right to a fair trial, does not catch national measures due to the scope of Art. 51(1) CFREU. These national rules may still fall into the scope of EU law by way of Art. 19(1)(2) TEU, in light of the general role of a national judge as a "Union judge".

This functional approach gives the ECJ means to intervene into the rule of law crisis, by ensuring that no national measures on court organization, which may endanger the rule of law, can escape legal scrutiny. Yet this ap-

[80] *Dassonville* (note 24), para. 5.

[81] ECJ, Case C-120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*), [1979] ECLI:EU:C:1979:42, para. 8.

[82] ECJ, Case C-267/91 *Keck*, [1993] ECLI:EU:C:1993:905, paras. 14 et seq.

[83] See e.g. ECJ, Case C-142/05 *Mickelsson and Roos*, [2009] ECLI:EU:C:2009:336, which concerned measures similar to sales arrangements but which were deemed to constitute an unlawful MEQR.

proach also lacks clarity in regard to the boundaries of EU law, or, more precisely, the boundaries of Art. 19(1)(2) TEU. If *ASJP* could be interpreted as meaning that there are areas of EU law which are not covered by the Charter but fall into the scope of the above provision, further case law is needed to clarify this issue. It is meaningful, further, to consider the *ASJP* in connection with the *LM* judgment, which reaffirmed the findings of *ASJP*, but also considered the implications of a violation of Art. 19(1)(2) TEU to the principle of mutual trust within the meaning of Art. 4(3) TEU. In exceptional cases, the ECJ empowered national courts to suspend mutual trust, despite its essential role in ensuring the effectiveness of EU law. However, as discussed below, this has limited potential to affect systemic rule-of-law deficiencies, which affect the entire judicial system of a Member State, as opposed to the outcomes of individual cases. This is due to the circumstance that a suspension of mutual trust is permitted only when there is a sufficient risk that in the circumstances of a particular case, these deficiencies may lead to a violation of the right to a fair trial of the person concerned. This may be difficult to prove given the *systemic* nature of the rule-of-law deficiencies, which may not always be apparent in an individual case.

3. The *LM* Judgment: Mutual Trust in the Two-Fold Test

a) Connection to Mutual Trust

Several months after the *ASJP* judgment, the Court further developed the notion of "independence" in the *LM* case. In contrast to *ASJP*, this case had a clear material link to EU law, and a connection to Poland. It concerned a request for a preliminary ruling by an Irish court regarding the execution of the European Arrest Warrant (EAW) issued by Polish authorities. The High Court of Ireland sought to know whether the EAW issued by Poland could be executed in light of the systemic violations of the rule of law in this Member State. The Irish court was concerned that due to the impaired independence of the Polish judiciary, the individual concerned could be deprived of his right to a fair trial under Art. 47 CFREU.[84]

The enforcement of the EAW inherently relies on the principle of mutual trust between the Member States. This trust rests on the notion that all Member States recognize a set of common values on which the EU is founded, as enshrined in Art. 2 TEU.[85] This common ground justifies the

[84] *Minister for Justice and Equality* (note 5), para. 25.
[85] *Minister for Justice and Equality* (note 5), para. 35.

obligation of the Member States, save for exceptional circumstances, to presume that all other Member States comply with EU law, in particular with regard to the fundamental rights. Accordingly, they may not demand a higher level of national protection than that enshrined in EU law; nor may they check whether the State in question has actually observed the fundamental rights under EU law in a specific case.[86] The existence of mutual trust determines the effectiveness of the European Arrest Warrant: Its mechanism relies on the notion that the criminal courts of all Member States, which have to conduct the criminal procedure after the EAW has been executed, meet the requirements of effective judicial protection.[87]

Considering the fundamental role of mutual trust for the effectiveness of EU law, the question raised by the Irish court could have far-reaching implications. The challenge of reconciling the principle of the mutual trust with the need to address violations of effective judicial protection in one of the Members compelled the Court to adjudicate on the fundamental aspects of the Member State obligations under EU law. Several options were available. If the Court decides that the EAW has to be executed in spite of systemic rule-of-law deficiencies in the issuing Member State, it could be interpreted as suggesting that judicial independence is *not* a *sine qua non* for the right to a fair trial or, for that matter, for EU law in general. This could raise the question what precisely is the meaning of effective judicial protection under EU law, if judicial independence is not a prerequisite for a fair trial.

Yet, if the ECJ decides that the Irish court could refuse to execute the EAW, this could seriously impair the horizontal judicial cooperation between the Member States. Would Poland still be considered equal to other Member States according to Art. 4(2) TEU? To allow Member States to suspend mutual trust could, further, negatively affect not only the area covered by the EAW but also other contentious areas of EU law, such as the transfer of refugees in line with the Dublin system or even the enforcement of civil judgments.[88] Evidently the Court was aware of this dilemma, as it chose a middle way based on the two-tiered test developed in *Aranyosi.*

[86] *Minister for Justice and Equality* (note 5), para. 37.
[87] *Minister for Justice and Equality* (note 5), para. 58.
[88] See *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, CML Rev. 55 (2018), 983, 992.

b) The Two-Tiered Test

Unlike the *ASJP* case, *LM* primarily concerned the right to a fair trial according to Art. 47 CFREU. Yet the ECJ promptly made a connection to Art. 19(1)(2) TEU: Effective judicial protection required by this provision encompasses judicial independence, which is essential for cooperation between the courts of the Member States.[89] In this light, this judgment reiterates and elaborates the criteria for the assessment of the judicial independence.[90] Yet the judgment also shows that concerns about systemic deficiencies of the rule of law in a Member State do not easily permit a national court of another State to suspend the application of EU law.

A national court may depart from the general rule of mutual trust only if the conditions of a two-tiered test are met. These conditions essentially echo the 2016 judgment *Aranyosi*.[91] The test, as laid down in *Aranyosi*, entails two steps. *First*, the national court must establish a real risk that the essence of a fair trial may be breached on account of systemic rule-of-law deficiencies in the Member State concerned. Impaired judicial independence may pose such a risk. *Second*, following *Aranyosi*, the national court has to assess the specific circumstances of the case,[92] in order to establish

> "specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run [the risk of a breach of his/her right to a fair trial]".[93]

The evidence supporting these grounds has to be objective, reliable, specific and properly updated.[94]

The evidence of systemic deficiencies *as such* is, thus, not considered sufficient to suspend mutual trust. It has to be demonstrated that in a specific case, there are grounds to believe that the individual concerned would be deprived of his or her rights under Art. 47 CFREU. The requirement of

---

89 *Minister for Justice and Equality* (note 5), paras. 50 et seq.

90 To guarantee judicial independence, there is a need for express legislative provisions on "the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members" and procedural guarantees against political control of judicial decisions embedded in the disciplinary rules concerning disciplinary offences and penalties. See *Minister for Justice and Equality* (note 5), paras. 63-67. See also Case C-222/13 TDC, [2014] EU:C:2014:2265, para. 32.

91 ECJ, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi*, [2016] ECLI:EU:C:2016:198, paras. 94-94.

92 *Aranyosi* (note 91), paras. 94-94.

93 *Minister for Justice and Equality* (note 5), para. 68.

94 *Aranyosi* (note 91), para. 94.

conducting a specific assessment also aligns with the ECtHR case law.[95] The Court emphasized, additionally, the necessity to apply the two-tiered assessment also in a case where the European Commission has initiated a sanctioning procedure under Art. 7 TEU against the Member State concerned.[96] In this respect, the Court held that the EAW may be suspended "only in the event of a serious and persistent breach by one of the Member States of the principles set out in Art. 2 TEU".[97] Thereby it added that it is for the European Council, within the frame of Art. 7(2) and (3) TEU, to decide whether a Member State has acted contrary to Art. 2 TEU. Until the European Council has done it, however, the national courts may refuse to execute an EAW issued by a Member State suspected of rule-of-law deficiencies only if there are sufficient grounds to hold that the latter would lead to a breach of the fundamental rights of the person concerned.[98] In this light, the two-tiered test draws attention to the fact that the question whether a Member State has infringed the rule of law is primarily a *political* rather than judicial issue. The courts are essentially required to wait for the results of the procedure under Art. 7 TEU.

4. The Mixed Signals of the Two Judgments

What can we learn about the current state of the EU system of judicial protection from the judgments *ASJP* and *LM*? Taken together, these two cases seem to send a mixed message. The *LM* case reiterates, in essence, the *Aranyosi* line of reasoning according to which, as a general rule, judicial cooperation in the spirit of mutual trust has to be upheld between the courts of the Member States. This general rule may not be departed from even if one of the Member States exhibits systemic deficiencies, unless these deficiencies can be proven to pose a sufficiently great risk to the fundamental rights of a concrete individual in a particular case. The *LM* case thus signalizes that a national court can and should inquire into systemic deficiencies in another Member State; yet in the end it is for the EU institutions to determine the compliance of a Member State with the rule of law, in line with the essentially political procedure under Art. 7 TEU.

However, *ASJP* shows that the ECJ seeks to intervene into the rule of law crisis, by means of an extensive reading of Art. 19(1)(2) TEU rather than

95 *Henryk Urban and Ryszard Urban v. Poland* (note 14), para. 46.
96 *Minister for Justice and Equality* (note 5), para. 69.
97 *Minister for Justice and Equality* (note 5), para. 70.
98 *Minister for Justice and Equality* (note 5), para. 73.

within the confines of Art. 7 TEU, which offers little room for action. This Treaty provision appears to have a scope that is broader than the Charter of Fundamental Rights, and to apply to the whole organization of the judiciary in a Member State. This interpretation allows the ECJ to scrutinize national measures that affect judicial independence – the primary venue of contestation in this rule-of-law crisis – irrespective of whether a particular dispute has a material link to EU law. In addition, this also means that Art. 19(1)(2) TEU represents a justiciable norm rather than a non-enforceable programmatic principle. Possibly, this could strengthen the chances of EU citizens in Poland or Hungary to invoke rule-of-law violations before national courts.[99] Hence, the broad reading of this Treaty provision arguably allows the ECJ to "supervise" the court organization in the Member States, thus aiding other EU institutions in enforcing compliance with the rule of law in the EU. Nonetheless, the fact that Art. 19(1)(2) TEU seems to have a fairly undefined scope remains an issue of legal certainty and should be clarified in subsequent case law.

Finally, an unintended consequence of the case law on Art. 19(1)(2) TEU should be noted. Since the ECJ has consistently considered the criterion of independence as one of the conditions for requesting a preliminary ruling, logically, a non-independent court should not be able to refer to the ECJ. The question is whether this means, accordingly, that the Polish and/or Hungarian courts no longer fulfil the requirements under Art. 267 TFEU and thus may no longer request a preliminary ruling. It is doubtful that *ASJP* or *LM* intended to imply this. In fact, the courts have shown willingness to cooperate with the ECJ.[100] It would thus be counterproductive to remove or restrict their status as Union courts.

[99] See e.g. *A. von Bogdandy/M. Kottmann/C. Antpöhler/J. Dickschen/S. Hentrei/M. Smrkolj*, Reverse Solange-Protecting the Essence of Fundamental Rights against EU Member States, CML Rev. 49 (2012), 489 et seq.

[100] Consider the request for a preliminary ruling by the Polish Supreme Court. See Decision of the Polish Supreme Court III UZP 4/18, 2.8.2018, <https://www.iustitia.pl> accessed 20.8.2019. Notably, the Polish law does not provide for an injunction or other protective measures in such a case, which resulted in vehement criticism from the Polish President. See, e.g.: Poland's President Says Will Likely Veto Changes to Election Rules, Reuters (9.8.2018) <http://www.euronews.com> accessed 20.8.2019.

V. Concluding Remarks: Towards the Centralization of the EU Model of Judicial Protection?

The fact that judicial independence encapsulates the essence of effective judicial protection and, by the same token, expresses the rule of law, is not new.[101] Yet the *ASJP* and *LM* judgments not only repeat this established postulate. They present the first account of the substantive meaning of Art. 19(1)(2) TEU,[102] which has been reaffirmed most recently in *Commission v. Poland* of June 2019. In particular, the *ASJP* and *LM* cases imply that the failure to meet the independence criterion amounts not only to a breach of Art. 19(1)(2) TEU; at the same time, it leads to a breach of Art. 2 TEU, as the rule of law is expressed precisely by ensuring effective judicial protection. This turns judicial independence into one of the key elements of a "litmus test" on whether a Member State respects its very basic obligations emanating from EU law. This may explain why the ECJ interprets the scope of Art. 19(1)(2) TEU in broad terms: When it comes to inquiring into whether a State respects its basic duties, the ECJ aims to ensure that no national measures escape scrutiny under EU law – a likely scenario if this Treaty provision is interpreted narrowly.

Evidently, the ECJ is willing to assume an active role in supervising national court organization even in situations that have no direct connection to EU rules. This may be seen as a response to the *systemic* nature of rule-of-law deficiencies: The effects of various national measures may not necessarily amount to serious violations of the rule of law if considered separately; yet taken together they may be sufficiently grave to erode key postulates of the rule of law. In this light, the Court's efforts to establish a broad reading of the scope of Art. 19(1)(2) TEU, as a tool for securing the rule of law, are reasonable.

Importantly, the impact of these judgments may potentially extend beyond the rule of law crisis, thus bearing a more general transformational power in the judicial system of the EU. In fact, particularly the *ASJP* judgment could be seen as the new "engine of integration", worthy of a place next to such landmark judgments as *Dassonville* or even *Costa E.N.E.L.*,[103] which established the supremacy of EU law. *ASJP* may play a central role in the deepening of the supranational dimension within the currently decentralized system of judicial protection in the EU. The inclusion of practically

[101] This has been established by the ECtHR as well. See *Agrokompleks v. Ukraine* (note 9), para. 136.

[102] *T. von Danwitz* (note 21), 10.

[103] *Costa v. E.N.E.L.* (note 36).

all national rules regarding the organization of courts into the scope of Art. 19(1)(2) TEU may bestow on the relationship between the ECJ and the national courts a more clearly pronounced vertical, hierarchical dimension. Thereby the organization of national courts would essentially fall under the supervision of the ECJ.[104] As some authors already claim that the Member States do not, in fact, have real procedural autonomy due to the apparent lack of limits regarding the requirement of equivalence and effectiveness in the case law of the ECJ,[105] the broad reading of Art. 19(1)(2) TEU might further strengthen these claims.

The move towards this vertical relationship strengthens the notion that a national judge is explicitly perceived as an EU judge, essentially removed from the exclusive competence of the Member State. The criterion of independence is, thus, no longer viewed as simply one of the many elements defining a court under Art. 267 TFEU. Its importance lies in establishing whether a Member State meets its obligations under EU law, expressed by Arts. 19(1)(2) TEU, together with Art. 2 TEU and, additionally, the duty of sincere cooperation under Art. 4(3) TEU.

It should be noted, however, that this broad interpretation of Art. 19(1)(2) TEU has to be viewed in light of Art. 4(2) TEU,[106] which entails the EU's duty to respect the national identities of the Member States which are "inherent in their fundamental structures, political and constitutional". This identity clause bears particular significance, as it embodies the prerogative of the Member States to govern areas pertaining to their fundamental political and legal national structures.[107] Arguably the organization of courts can be seen as part of these structures.[108]

At the same time, the identity clause is not absolute and may not be invoked to escape obligations under EU law: According to *von Bogdandy* and *Schill*, the limits of the identity clause are drawn by the common values established in Art. 2 TEU.[109] Art. 4(2) TEU implies a "constitutional interac-

104 *M. Bonelli/M. Claes* (note 62), 643.

105 *M. Bobek* (note 46).

106 See e.g. *G. van der Schyff*, The Constitutional Relationship Between the European Union and Its Member States, ELRev 37 (2012), 563 et seq.; *M. Dobbs*, The Shifting Battleground of Article 4(2) TEU: Evolving National Identities and the Corresponding Need for EU Management?, European Journal of Current Legal Issues 21 (2015), (no page numbers available, but the article may be found under <http://webjcli.org> accessed 20.8.2019).

107 *A. von Bogdandy/S. Schill*, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, CML Rev. 48 (2011), 1417, 1425.

108 According to *von Bogdandy* and *Schill* "only elements somehow enshrined in national constitutions or in domestic constitutional processes can be relevant for Article 4(2) TEU". *A. von Bogdandy/S. Schill* (note 107), 1430.

109 *A. von Bogdandy/S. Schill* (note 107).

tion"[110] between the EU and the Member States based on the notion of a national identity that is deeply integrated into the EU *acquis*, as part of a composite constitutional framework.[111] In this light, the duty of the Member States to guarantee judicial independence also outside of cases directly concerning EU rules corresponds to the idea that the Member State law exists not alongside EU law but within it.[112] Nonetheless, further case law is needed to determine the external boundaries of Art. 19(1)(2) TEU.

110 *G. van der Schyff* (note 106), 568.
111 *A. von Bogdandy/S. Schill* (note 107), 1426.
112 *G. van der Schyff* (note 106), 568.