**EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, 2026**

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# IN COURTS WE TRUST:

# THE GUARDIANS OF EUROPEAN VALUES

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*Distinguished members of the ENCJ,*

## I. Introduction

It is a true honour and privilege to stand before you today in Paris — the City of Light — to mark this year's ENCJ General Assembly. I wish to extend my sincere congratulations to the members of the ENCJ, and to each and every member of the national councils for the judiciary present here today, for the remarkable work they carry out in protecting, upholding, and promoting the rule of law within the European legal order.

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Your work lies at the very heart of ensuring that EU citizens can access strong and independent courts — courts which rule freely, without fear or favour. I am deeply grateful for your continued efforts and unwavering commitment. The European Union, founded as it is upon the rule of law, simply could not function without you.

As the keynote speaker, I have decided to focus on the value of respect for the rule of law enshrined in Article 2 TEU. I have chosen to speak about that value because it fits well with the general theme of this year's assembly, which focuses on trust in the judiciary. Besides, eight years after the Court of Justice delivered its seminal judgment in *Associação Sindical dos Juízes Portugueses*,[1] the time seems right to take stock of the case-law of the Court of Justice on the value of respect for the rule of law in general, and on the judicial independence of national courts in particular.

I shall divide my speech into three parts.

First, I shall examine the case-law predating that seminal judgment, showing that, previously, providing national courts with the necessary jurisdiction (remedies) was deemed enough to secure compliance with the rule of law.[2]

Second, I shall argue that providing such jurisdiction is not enough when judicial independence comes under threat. That is because only independent judges may provide effective judicial

[1] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

[2] See, in this regard, K. Lenaerts, 'New Horizons for the Rule of Law within the EU' 21 (2020) *German Law Journal* 29.

protection to the rights that EU law confers on individuals (effective remedies). To that end, in a series of ground-breaking judgments, the Court of Justice has progressively developed the principle of judicial independence under EU law.

Third and last, I shall argue that the body of case-law on the rule of law appears to be sufficiently mature. The Court of Justice is therefore being called upon to examine 'second generation' cases, in which it must further develop already-existing principles. This is by no means an easy task, as the Court must find the right course while navigating between two opposite approaches: one *maximalist* which would allow no room for national diversity and one *minimalist* which would deprive the rule of law of its substance.

## II. Providing the necessary jurisdiction (remedies)

More than fifty years ago, the Court of Justice famously held in *van Gend en Loos* that the judicial protection of EU rights is based on a system of dual vigilance.[3] In addition to the supervision carried out at EU level by the European Commission and the Member States, individuals are entitled to rely on their EU rights in the national courts.[4] The enforcement of EU law is largely decentralised, in so far as the Treaties — and Article 19 TEU in particular — entrust 'the

[3] Judgment of 5 February 1963, *van Gend & Loos* (26/62, EU:C:1963:1). See, in this regard, K. Lenaerts and J.A. Gutiérrez-Fons, 'Van Gend en Loos: A Star is Born' in P. Craig and R. Schütze (eds), *Landmark Cases in EU Law, Volume 1* (Oxford, Hart Publishing, 2025), 17.
[4] *Ibid*.

responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law to national courts and tribunals and to the Court of Justice.'[5] In the EU, judicial power is shared between the EU Courts and national courts. It is for the Court of Justice to say what the law of the EU is, and for national courts — as the 'courts of general jurisdiction' of the EU — to apply that law.

National courts have thus played a leading role in upholding the rule of law within the EU. In cooperation with the Court of Justice, they have relied on EU law in order to provide effective remedies to EU rights conferred upon individuals. By virtue of EU law, national courts have provided access to justice where national law prevented those courts from second-guessing the decisions of public authorities.[6] They have set aside conflicting legal norms, including those of constitutional rank.[7] They have also granted interim, declaratory, and monetary relief, even when national law failed to provide those remedies.[8]

In providing judicial protection, national courts may engage in a dialogue with the Court of Justice. The preliminary ruling mechanism, which is the keystone of the EU system of judicial

[5] See, e.g., judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), para 47, and of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), para. 217.

[6] See, e.g., judgment of 15 May 1986, *Johnston* (222/84, EU:C:1986:206).

[7] See, e.g., judgment of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503), para. 61 (holding that '[r]ules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of Union law').

[8] See judgments of 19 June 1990, *Factortame and Others* (C-213/89, EU:C:1990:257); of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49); and of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79).

protection,[9] ensures the uniform interpretation and application of EU law. That mechanism also guarantees that citizens across the EU enjoy equal protection under EU law. Since the dialogue between national courts and the Court of Justice is based on the law — and nothing but the law — access to the preliminary ruling mechanism is open only to courts which are independent. Judicial independence is required because it guarantees that the national court which is referring a question to the Court of Justice will not take political considerations into account when making the reference or when implementing the Court's judgment.

Until recently, providing the necessary remedies was deemed sufficient in itself to secure the primacy, unity and effectiveness of EU law. With these remedies, European integration was able to move forward. The case-law of the Court of Justice focused on the effectiveness of the remedies to be provided by national courts rather than on protecting the independence of the national courts providing those remedies. Academic discussions, as well as references to the Court of Justice, dealt with the complex question of how to strike the right balance between the principle of national procedural autonomy and the twin principles of equivalence and effectiveness.[10] It is true that the Court of Justice has previously examined the principle of judicial independence as a necessary requirement for the referring

[9] Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014 (EU:C:2014:2454), para. 37.

[10] See, e.g., C. Kakouris, 'Do the Member States Possess Judicial Procedural Autonomy?' (1997) 34 *Common Market Law Review* 1389, 1389–412; S. Prechal, 'Community Law in National Courts: The Lessons from Van Schijndel' (1998) 35 *Common Market Law Review* 681, 681–706); W. van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501, 501–36.

body to access the preliminary ruling mechanism when a body — which did not belong to the national judiciary — sought to make a reference to the Court.[11] That case-law, however, did not relate to concerns that the judicial independence of a national court was in doubt.

Perhaps, given that the principle of judicial independence stems from the constitutional traditions common to the Member States as one of the founding tenets of any democratic system of governance, it was assumed that national governments would never threaten it. That principle was "uncontested and incontestable."[12]

It was taken for granted that national governments would encourage their citizens to trust the courts as the ultimate arbiters of any legal dispute, including in situations when the court ruling opposed the political majority of the day. However, unfortunately, reality shows a different picture today.

As some Member States cross the Rubicon of undermining judicial independence, one question looms large: who will guarantee the independence of national courts? Put simply, who will 'protect the protectors' of the rule of law?

[11] See, for example, judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145), which is now overruled by judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17).

[12] T. von Danwitz, 'Values and the Rule of Law: Foundations of the European Union–An Inside Perspective from the ECJ' (2018) 21 *Potchefstroom Electronic Law Journal* 1.

## III. First-Generation Cases

In *Associação Sindical dos Juízes Portugueses*, the Court of Justice delivered a ground-breaking judgment which contributed to defining the very identity of the EU as a rule-based legal order. It is safe to say that that judgment is a classic of EU law, just like *van Gend en Loos*, *Costa v ENEL*, *Simmenthal*, *Brasserie du pêcheur*, to name just a few.

In that seminal judgment, and in subsequent ones, the Court of Justice explained *why* the judicial independence of national courts must be protected, and *how* such independence is safeguarded under EU law.

### A. Why does the judicial independence of national courts constitute a fundamental requirement of the EU legal order?

As to the reasons why the judicial independence of national courts constitutes a fundamental requirement of the EU legal order, structural considerations weigh heavily in the Court's reasoning. Judicial independence, which gives concrete expression to the value of respect for the rule of law, seeks to protect both the constitutional structure set out in the Treaties and the functioning of that structure.

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

As an essential component of that constitutional structure, the EU judicial architecture serves to secure the operation of the principles of effective judicial protection and of equality before the law. Both principles are an integral part of the rule of law within the EU.[14] The EU judicial architecture further seeks to facilitate the operation of the twin principles of mutual trust and mutual recognition. That architecture includes not only the EU Courts (the Court of Justice and the General Court) but also the courts of the Member States, which are the courts of general jurisdiction for the application and enforcement of EU law.

National courts are therefore an essential building block of the EU constitutional structure,[15] playing three vital roles within it.

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[13] Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, para. 167. See also K. Lenaerts and J. A. Gutiérrez-Fons, 'A Constitutional Perspective' in T. Tridimas and R. Schütze (eds.), *Oxford Principles of European Union Law*, *Vol. 1, The European Union Legal Order* (Oxford, OUP, 2018) 122.

[14] Judgments of 16 February 2022, *Hungary v Parliament and Council* (C-156/21, EU:C:2022:97), para. 229, and *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 324.

[15] K. Lenaerts, 'The Two Dimensions of Judicial Independence in the EU Legal Order' in R. Spano and Others (eds.), *Fair Trial: Regional and International Perspectives/Procès equitable: perspectives régionales et internationales. Liber Amicorum Linos-Alexandre Sicilianos* (Limal, Anthemis, 2020), at 346.

First and foremost, they are to provide individuals with effective judicial protection of their EU rights. It is therefore for the Member States, in accordance with Article 19(1) TEU, to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

Second, national courts, in cooperation with the Court of Justice, secure the uniform interpretation and application of EU law and, in so doing, guarantee that EU law has the same meaning throughout the Member States. Since there is no equality before EU law without such uniform interpretation and application, Member States must refrain from adopting measures which may undermine the operation of the preliminary ruling mechanism,[16] laid down in Article 267 TFEU, which is the 'keystone of the EU judicial system'.[17]

Third and last, in order to establish an Area of Freedom, Security and Justice ('AFSJ') which guarantees the free movement of judicial decisions, national courts must trust that their counterparts in other Member States are equally committed to providing effective judicial protection of EU rights.

If a Member State adopts measures which undermine the independence of national courts, the EU judicial architecture is compromised and so too is the rule of law within the EU.

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[16] Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), paras 56-57.
[17] See judgments of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158), para. 37, and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853), para. 41

*Without judicial independence*, there is no effective judicial protection of EU rights given that it 'is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[18]

*Without judicial independence*, a court may not engage in a dialogue based on the law – and nothing but the law – with the Court of Justice.

*Without judicial independence*, national courts stop trusting each other, leading to the fragmentation of the AFSJ.[19]

This brings me to the question of *how*. How is the judicial independence of national courts protected under EU law?

[18] Judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), para. 48, of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), para. 58; of 5 November 2019, *Commission v Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924), para. 106; of 26 March 2020, *Review Simpson v Council and HG v Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), paras 70 and 71; of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535), para. 45; of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU), EU:C:2020:1033, para. 39; of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798), para. 108, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU:C:2021:931), para. 66.

[19] The Court of Justice has summarised those three aspects of judicial independence in its case-law. See judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535), para. 45.

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

First, EU law protects national judges in their institutional capacity. Second, it guarantees the proper functioning of the preliminary ruling mechanism. Third, it upholds the principle of mutual trust, which is a *conditio sine qua non* for the free movement of judicial decisions. Fourth and last, the twin principles of constitutional alignment and non-regression serve to protect the EU constitutional structure, an essential part of which is independent national courts. Let us take a closer look at those four aspects.

### 1. *Protecting Judges as the Arm of EU law*

To begin with, Article 19(1) TEU, which gives concrete expression to the rule of law,[20] places the Member States under the obligation to provide effective remedies 'in the fields covered by EU law'. Given that there is an unbreakable link between effective remedies and independent courts, that Treaty provision obliges the Member States to protect that independence. Since that independence serves, in turn, to protect the integrity of the EU judicial architecture,

[20] Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, (C-216/18 PPU, EU:C:2018:586), para. 50 and the case-law cited. See judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), para. 47; of 5 November 2019, *Commission v Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924), para. 98.

the Court of Justice has interpreted the scope of application of that Treaty provision in the light of structural considerations.

Unlike Article 51(1) of the Charter, the application of Article 19(1) TEU is not made conditional upon EU law being implemented in the case at hand. That Treaty provision applies where a particular body, which is considered to be a 'court or tribunal' within the meaning of EU law, enjoys jurisdiction over questions pertaining to the interpretation and application of that law.[21] If that is the case, Article 19(1) TEU applies, protecting the independence of such a court. That Treaty provision protects that independence *at all times*. This is because only such permanent protection can prevent the entire edifice of EU judicial remedies from collapsing.[22]

In particular, unlike Article 47 of the Charter, the scope of application of Article 19(1) TEU is not limited to protecting the rights that EU law confers on individuals.[23] Acting in an individual capacity, a judge, just like any person, has the right to 'an independent judge or tribunal' enshrined in Article 47 of the Charter, provided that he or she requests the judicial protection of his or her EU rights.[24] Acting in

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[21] Judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), para. 29, and of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), para. 82 and the case-law cited.

[22] K. Lenaerts (above n 15), at 346.

[23] Judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, (C-824/18, EU:C:2021:153), paras 87-88, and judgment of 20 April 2021, *Repubblika*, (C-896/19, EU:C:2021:311), para. 41.

[24] For example, in judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), para. 79, the Court of Justice applied Article 47 of the Charter since the applicants in the main proceedings, who were two judges of the Polish Supreme Court, 'relied, inter alia, on infringements to their detriment of the prohibition of discrimination in employment on the ground of age, which is

an institutional capacity, a judge whose independence is being undermined by executive or legislative action may bring proceedings before another court on the ground that such a course of action is contrary to Article 19(1) TEU. This is so regardless of whether his or her EU rights are directly at issue.[25]

The guarantees of independence and impartiality required under EU law apply to national rules regarding, *inter alia*, the appointment, length of service and grounds for abstention, rejection and dismissal of judges, as well as to various rules determining the disciplinary regime and type of personal liability for judicial error applicable to them.

In order to determine whether national law complies with those guarantees, the Court of Justice has developed the so-called test of appearances, according to which those rules must be such as 'to dispel any reasonable doubt in the minds of individuals as to the imperviousness of [national judges] to external factors and [their] neutrality with respect to the interests before [them]'.

The relevant case-law of the Court of Justice reveals four key features of the test of appearances.

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provided for by Directive 2000/78'. See, in the same way, judgment of 6 November 2012, *Commission v Hungary* (C-286/12, EU:C:2012:687).

[25] For example, in judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), the applicant, an association representing members of the Tribunal de Contas (Portuguese Court of Auditors), claimed before the Portuguese Supreme Administrative Court that salary-reduction measures passed by the Portuguese legislator were contrary to the principle of judicial independence. The Court of Justice held that Article 19(1) TEU applied to the case at hand, provided that the Tribunal de Contas was a court within the meaning of EU law that was called upon to interpret and apply that law. On the merits, it found, however, that the judicial independence of those members was not called into question by the salary-reduction measures at issue since those measures were of general application, proportional and temporary.

First, the concept of judicial independence, as developed in the seminal *Wilson* judgment,[26] has both an internal and an external dimension. Internally, judicial independence is intended to ensure a level playing field for the parties to the proceedings and for their competing interests. In other words, independence requires courts to be impartial. Externally, judicial independence establishes the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure which might jeopardise the independent judgement of their members as regards proceedings before them.[27] That protection must apply to the members of the judiciary by means of, for example, the laying down of guarantees against removal from office.

Second, when determining whether national rules undermine judicial independence, one must not only examine their normative content, but also the reasons behind their adoption and the way they are enforced. The Court of Justice has endorsed an understanding of judicial independence which includes both legal and factual elements (independence *de jure* and independence *de facto*).

Third, when examining the relevant rules and factual context in which they apply, the Court of Justice follows a combined assessment of all the relevant factors. Whilst one factor may not suffice in itself to call into question the principle of judicial independence, that factor

[26] Judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587), paras 49-52.
[27] *Ibid*., para 51.

taken together with others might cast doubt as to the independence of the national court in question.

Fourth and last, in developing the test of appearances, the Court of Justice has relied heavily on the case-law of the European Court of Human Rights (the 'ECtHR'). Notably, in interpreting the concept of 'an independent and impartial tribunal previously established by law' laid down in Article 47 of the Charter, the Court of Justice drew extensively from the seminal judgment of the ECtHR in *Guðmundur Andri Ástráðsson v. Iceland*.[28]

I would like to illustrate these points by looking at two examples taken from the first generation of cases, each example pertaining to a different type of rule.

Regarding the rules on the appointment of judges, the Court of Justice has held that the mere fact that 'the judges concerned are appointed by the legislature and the executive… does not give rise to a relationship of subordination of those judges to the legislature or the executive or to doubts as to their impartiality, if, once appointed, they are free from influence or pressure when carrying out their role'.[29] In that regard, '[the] participation of a body [which is empowered under the national Constitution to ensure the independence of the courts and

[28] See ECtHR, judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418). See, in this regard, judgment of 26 March 2020, *Review Simpson v Council and HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232.

[29] Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), para. 133, and of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034), para. 233.

of the judiciary,] in the context of a process for the appointment of judges, may, in principle, be such as to contribute to making that process more objective', by curtailing the legislature and the executive's discretion. This is true provided that such a body is itself independent.[30]

In *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the referring court, which was the Labour and Social Insurance Chamber of the Polish Supreme Court, asked whether the fact that it had been stripped of its jurisdiction over a dispute concerning the early retirement of two Supreme Court judges, in favour of the newly created Disciplinary Chamber, was compatible with EU law. The applicants claimed that their early retirement, which had been imposed by a legislative reform, was contrary to the principle of non-discrimination on grounds of age as provided for by Directive 2000/78. The question of the referring court arose therefore in *limine litis*: before solving the merits of the case, it had first to determine whether that jurisdictional stripping was contrary to the principle of judicial independence under EU law. To that end, the referring court had to determine whether the newly appointed judges of the Disciplinary Chamber were themselves independent. Drawing on the case-law of the ECtHR, the Court of Justice provided guidance to the national court on the factors to assess in determining whether

[30] Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982), paras 136 to 138; judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153), paras 124 and 125; and of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), paras 99 and 100 and the case-law cited.

the judges of the Disciplinary Chamber were independent. Notably, it had to look at the fact that the judges of the Disciplinary Chamber had been appointed through a particular process, at the fact that that Chamber had been granted exclusive jurisdiction to rule on cases on the retirement of Supreme Court judges resulting from the legislative reform at issue, and at the fact that the Disciplinary Chamber was constituted solely of newly-appointed judges and appeared to enjoy a particularly high degree of autonomy within the Supreme Court.

As regards specifically the rules governing the disciplinary regime, the requirement of independence means, in essence, that 'that regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions'. 'Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary'.[31]

In *Commission v Poland (Disciplinary regime for judges)*, for example, the Court held that that Member State had failed to fulfil its

[31] Judgment of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596), para 61 and the case-law cited.

obligations under the Treaties, since the disciplinary regime at issue did not provide the necessary guarantees. First, referring to its previous findings in *A.K. and Others*, the Court of Justice found that the Disciplinary Chamber had not provided all the guarantees of impartiality and independence and, in particular, was not protected from the direct or indirect influence of the Polish legislature and executive. Most importantly for our present purposes, it found that the disciplinary regime had allowed the content of judicial decisions adopted by judges of the ordinary courts to be classified as a disciplinary offence. That classification could be used in order to exert political control over judicial decisions or to exert pressure on judges with a view to influencing their decisions, and could undermine the independence of the courts concerned.

### 2. *Protecting Judicial Dialogue*

The principle of judicial independence under EU law serves to protect the integrity of the judicial dialogue between the Court of Justice and national courts. This is done in two different – albeit mutually reinforcing – ways.

First, access to the preliminary ruling mechanism is limited to national courts, which are independent. This limitation reflects the principle that judicial dialogue must remain insulated from political considerations and be anchored exclusively in the authority of law.

In that regard, the Court of Justice has held that if a reference is made by a court established by national law, i.e. one belonging to the national judiciary, such a court will be presumed to be a court or tribunal within the meaning of Article 267 TFEU. However, in *Getin Noble Bank*, [32] the Court of Justice held that such a presumption may be rebutted where a final ruling of a national or international court, such as the ECtHR, finds that the judge constituting the referring court is no longer independent.[33] Moreover, the Court applies the principle according to which the presence of a single judge who is part of the panel of the referring court, and whose appointment raises reasonable doubts in the minds of individuals regarding his or her independence and impartiality, is sufficient to prevent the referring court from having access to the preliminary ruling mechanism.[34]

In *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, the Court of Justice ruled, for the first time, that a chamber of a court, namely the Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court, was not independent and, as a result, could not engage in a dialogue with the Court of Justice.[35] This was because the appointment procedure of the judges sitting in that

[32] Judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235).
[33] *Ibid*., para. 72 (holding that '[t]he presumption [of admissibility] may nevertheless be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring [court] is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter').
[34] See judgment of 26 March 2020, *Review Simpson v Council and HG v Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paras 69 to 75, and order of 29 May 2024, *Rzecznik Praw Obywatelskich (Polish extraordinary appeal)*, C-720/21, EU:C:2024:489, para. 29.
[35] Judgment of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, EU:C:2023:1015.

Chamber gave rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judges concerned. In that regard, the Court based its ruling on final judgments of the Polish Supreme Administrative Court and of the ECtHR, respectively,[36] concerning that appointment procedure.[37]

Second, EU law prevents Member States from threatening national courts with the opening of disciplinary proceedings where a national court engages in a dialogue with the Court of Justice. Indeed, the prospect of disciplinary proceedings against courts which have made a reference could have a 'chilling effect' on all courts of the Member State concerned, as those courts would, in future cases, think twice before engaging in a dialogue with the Court of Justice.

In the *Eurobox–RS–Lin* case-law,[38] for example, the Court of Justice held that the principle of primacy opposed Romanian legislation and practices under which ordinary Romanian courts were bound by the case-law of the Romanian Constitutional Court on matters of EU law. As a result, these courts could not, without risking disciplinary proceedings, disapply of their own motion that case-law,

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[36] See judgments of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 21 September 2021, and of ECtHR of 8 November 2021, Dolińska-Ficek and Ozimek v. Poland, CE:ECHR:2021:1108JUD004986819.

[37] Judgment of 21 December 2023, *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*, C-718/21, EU:C:2023:1015, paras 44 and 45. See also order of 29 May 2024, *Rzecznik Praw Obywatelskich (Polish extraordinary appeal)*, C-720/21, not published, EU:C:2024:489.

[38] See judgments of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paras 257 to 260; of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paras 74 and 75, and of 24 July 2023, *Lin*, C-107/23 PPU, EU:C:2023:606, paras 132 and 133. See also judgment of 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581.

even if they considered it to be contrary to provisions of EU law producing direct effect.

### 3. *Protecting Mutual Trust*

The Court of Justice has consistently held that the principle of mutual trust and the principle of judicial independence go hand-in-hand within the AFSJ. The free movement of judicial decisions can take place only if the Member States trust each other to be equally committed to upholding the values on which the EU is founded, notably the rule of law. More often than not, the execution of judicial decisions within the AFSJ entails the adoption of coercive measures which limit the fundamental rights of the person concerned, especially the right to liberty. In the context of the European Arrest Warrant (the 'EAW'), this is, for example, regularly the case. Only an independent court can guarantee that the judicial decision to be recognised and enforced was adopted in conformity with the fundamental rights guaranteed by the Charter.

This means, in essence, that, if an EAW is issued by a national court which is not independent, such a warrant may not be executed. In *Openbaar Ministerie* (*Tribunal established by Law in the issuing Member State*), the Court of Justice confirmed the two-step examination that the executing judicial authority must follow before refusing the execution of an EAW. In that case, the Court found that

the two-step examination which had been put forward in the seminal *Celmer* case – which involved the requirement of judicial independence[39] – also applied *mutatis mutandis* in relation to the right to a tribunal previously established by law. This was because of 'the inextricable links which… exist, for the purposes of the fundamental right to a fair trial, within the meaning of [Article 47 of the Charter], between [those two] guarantees'.[40] In *Puig Gordi and Others*, the Court of Justice confirmed once again the two-step examination, holding that it also applies to cases where the person concerned risks being tried by a court which lacks jurisdiction.[41]

It is worth recalling those two steps. The first step focuses on the operation of the justice system of the Member State concerned as a whole.[42] The executing judicial authority must, in the light of objective, reliable, specific and properly-updated material, find that there is a real risk of a breach of the fundamental right to a fair trial. This risk must be connected in particular with a lack of independence of the courts of the issuing Member State or with a failure to comply with the requirement for a tribunal established by law, on account of

[39] It is worth recalling that 'the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial'. Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 48. See also judgments of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU et C-412/20 PPU, EU:C:2020:1033, para. 39; of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, para. 45, and of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, para. 95.

[40] Judgment of 22 February 2022, *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, para. 55.

[41] Judgment of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57.

[42] Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, para. 61.

systemic or generalised deficiencies in the justice system of the issuing Member State. In *Puig Gordi and Others*, the Court pointed out that those systemic or generalised deficiencies may be found in respect of a group of objectively-identifiable persons to which the person concerned belongs.

As a second step, the executing judicial authority must assess the circumstances of the case at hand. Having regard to the personal circumstances of the individual concerned, as well as to the nature of the offence for which he or she is being prosecuted and to the factual context which forms the basis for the EAW, the executing judicial authority must determine whether the systemic or generalised deficiencies in the justice system of the issuing Member State are liable to call into question the independence of the court which actually issued the EAW in question. [43]

### 4. *Twin principles: constitutional alignment and non-regression*

Moreover, in *Repubblika*,[44] the Court of Justice put forward two constitutional principles which seek to guarantee the proper functioning of the EU constitutional structure, i.e. the principle of constitutional alignment and the principle of non-regression in value protection.

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[43] *Ibid*., paras 74 to 77.

[44] Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311. See, also, for example, judgment of 5 June 2023, *Commission v Poland (Independence and private life of judges)*, C-204/21, EU:C:2023:442, para. 64.

First, a candidate State for EU membership must align its own constitution and national identity with the values on which the EU is founded as a *conditio sine qua non* for accession. The 'Copenhagen Criteria' require, *inter alia*, strict adherence to that alignment. The decision to align its own constitutional arrangements with EU values is the sovereign choice of a candidate State for EU membership.[45] However, if a candidate State fails to do so, Article 49 TEU bars it from becoming a member of the EU.[46]

The principle of constitutional alignment means, in particular, that a Member State may not invoke its national identity in order not to comply with Article 2 TEU and the Treaty provisions which give concrete expression to the values on which the EU is founded.[47] Acquiring the status of a Member State is, therefore, a 'constitutional moment' for the State concerned since, at that very moment, the legal order of the new Member State is deemed by the 'Masters of the Treaties' to uphold the values on which the EU is founded.

Second, after accession, the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is 'no turning back the clock' when it comes to respecting the values contained in

[45] The same applies where a Member State decides to withdraw from the EU. See judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, para. 50.

[46] That provision states that '[a]ny European State *which respects the values referred to in Article 2* and is committed to promoting them may apply to become a member of the Union.' (Emphasis added). Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para. 61.

[47] Judgment of 5 June 2023, *Commission v Poland (Independence and private life of judges)*, C-204/21, EU:C:2023:442, para. 72. The same holds true for the provisions of the Charter giving concrete expression to the values on which the EU is founded. See, in this regard, judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paras 42 to 51, and judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paras 53 to 65.

Article 2 TEU. Accession is the starting point in value protection, not the finish line. A Member State can always improve its level of value protection. However, EU law precludes a Member State from drifting towards an authoritarian regime or from falling into democratic backsliding. 'Compliance with those values', the Court of Justice has held, 'cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession'.[48] The Member States must respect those values 'at all times'.[49]

## IV. Second-Generation Cases

### 1. *Four Factors*

It may be argued that the case-law of the Court of Justice on judicial independence is gradually entering a new phase, in which the Court is required to reinterpret established principles across diverse contexts.

The emergence of this new phase in the case-law on the rule of law can be inferred from four factors.

[48] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 126, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 144.
[49] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 234, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 266.

### *i. First Factor: Beyond the Grand Chamber*

*First*, cases concerning the principle of judicial independence are no longer allocated exclusively to the Grand Chamber. Instead, several cases have been decided by five-judge chambers.[50]

This is the case, for example, of *Prezes Urzędu Ochrony Konkurencji i Konsumentów*,[51] in which the Fifth Chamber of the Court of Justice held that the Civil Chamber of the Polish Supreme Court, sitting in a single-judge formation, did not constitute a 'court or tribunal' within the meaning of Article 267 TFEU. The reference made by the Civil Chamber was therefore declared inadmissible. In reaching that conclusion, the Court of Justice drew on its previous findings in *Getin Noble Bank* and *Krajowa Rada Sądownictwa (Continued holding of a judicial office)*. It relied on final judgments of the Polish Supreme Administrative Court and of the ECtHR, respectively, [52] concerning the appointment procedure of the judge concerned. The Court of Justice found that 'the flaws in the process leading to the appointment of [the judge concerned which were] identical to those in the procedure for the appointment of judges of the

[50] See, e.g., judgments of 7 September 2023, *Asociația 'Forumul Judecătorilor din România'* (C-216/21, EU:C:2023:628); of 18 April 2024, *OT and Others (Abolition of a court)* (C-634/22, EU:C:2024:340); of 8 May 2024, *Asociația 'Forumul Judecătorilor din România' (Associations of judges)* (C-53/23, EU:C:2024:388); of 14 November 2024, *S. (Modification of the formation of the court)* (C-197/23, EU:C:2024:956); of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303); of 3 July 2025, *Lita and Jeszek* (C-646/23 and C-661/23, EU:C:2025:519), and of 4 September 2025, *„R"* (C-225/22, EU:C:2025:649).

[51] Judgment of 7 November 2024, *Prezes Urzędu Ochrony Konkurencji i Konsumentów* (C-326/23, EU:C:2024:940).

[52] See judgments of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 6 May 2021, and of ECtHR of 3 February 2022, *Advance Pharma sp. z o.o. v. Poland* (ECLI:CE:ECHR:2022:0203JUD00146920) .

Extraordinary Review and Public Affairs Chamber, and [were] sufficient, in themselves, to give rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge'.[53]

### *ii. Second Factor: Impact on the Case-Law of the ECtHR*

*Second*, the ECtHR has consistently cited the case-law of the Court of Justice when deciding cases which also focus on judicial independence. This is indicative of the importance, depth and significance of the Court of Justice's case-law in the European legal space. To name just a few examples, the ECtHR has referred to the judgment of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and to that in *Commission v. Poland (Independance of the Supreme Court)* when interpreting the principle of irremovability of judges.[54] More recently, again citing those two judgments, the ECtHR held in *Reczkowicz v. Poland* that the procedure for the appointment of the members of the Disciplinary Chamber of the Polish Supreme Court was unduly

[53] *Ibid*., para. 35.

[54] In particular, the ECtHR concurs with the Court of Justice in that 'that principle is not absolute, although an exception to that principle would only be acceptable "if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it'. See ECtHR, judgment of 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418), ¶ 239 (quoting judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), para. 139).

influenced by the legislature and the executive, which is *per se* incompatible with Article 6(1) ECHR.[55]

### *iii. Third Factor: Drawing Heavily on Existing Case-Law*

*Third*, in these second-generation cases, the Court will begin its reasoning by drawing heavily on its existing case-law and subsequently, developing it further. For example, in *Associação Sindical dos Juízes Portugueses*, the Court put forward three primary findings regarding the principle of judicial independence as applied to national measures determining judges' remunerations. First, 'the receipt by [judges] of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence'.[56] Second, salary-reduction measures applied to judges must pursue a legitimate aim, such as mandatory requirements linked to eliminating the Portuguese State's excessive budget deficit in the context of an EU programme of financial assistance to Portugal.[57] Third and last, those measures must comply with the principle of proportionality. In the case at hand, these factors all applied. The scope of the measures was limited to a percentage varying in accordance with the level of salary.[58] They were

[55] ECtHR, judgment of 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719, ¶ 276.
[56] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), para. 45.
[57] *Ibid*., para. 46.
[58] *Ibid*., para. 47.

temporary in nature, and did not target Portuguese judges specifically, but applied to various public office holders as part of a comprehensive effort to cut down spending in the public sector at a time of economic crisis.[59]

In Joined Cases *Sąd Rejonowy w Białymstoku and Adoreikė*,[60] decided in February 2025, the Court drew on its previous findings in *Associação Sindical dos Juízes* Portugueses in order to develop the principle of judicial independence further by looking at two different questions.

As to the first question, the Court of Justice was asked to provide guidance regarding general rules which determine judges' remuneration. It began by recalling its previous case-law, according to which EU law does not impose a particular constitutional model, but limits itself to providing a 'framework of reference' (or 'red lines') within which the Member States may make their own choices according to their history and tradition.[61] Next, when the executive and the legislature of a Member State adopt those general rules, they must comply with the following four conditions.[62] In order to define those conditions, the Court of Justice referred repeatedly to documents of the Council of Europe and the UN.[63] First, general rules for

[59] *Ibid*., paras 49 and 50.
[60] Judgment of 25 February 2025, *Sąd Rejonowy w Białymstoku and Adoreikė* (C-146/23 and C-374/23, EU:C:2025:109).
[61] *Ibid.*, paras 45 and 46 [citing judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, paras 38 and 43].
[62] Judgment of 25 February 2025, *Sąd Rejonowy w Białymstoku and Adoreikė* (C-146/23 and C-374/23, EU:C:2025:109), para. 90.
[63] Ibid., para. (holding that 'charters, reports and other documents drawn up by bodies of the Council of Europe or under the aegis of the United Nations may provide relevant guidance for the

determining judges' remuneration must be provided for by law, i.e. have a legal basis. Second, those rules must be detailed, objective, foreseeable, stable and transparent. Third, they must ensure that judges receive a level of remuneration commensurate with the importance of the functions they carry out, having regard to the economic, social and financial situation of the Member State concerned and to the average salary in that Member State.[64] Fourth and last, those general rules may be subject to effective judicial review in accordance with the procedural rules laid down by the law of that Member State.

As to the second question, the Court was asked to determine the conditions under which the executive and the legislature of a Member State may derogate from the national legislation which objectively defines general rules for determining judges' remuneration, either by freezing or reducing the amount of that remuneration. The Court held that the four conditions imposed on the general rules apply also to measures derogating from those rules, adding that the derogating measures must pursue a legitimate interest and comply with the

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interpretation of EU law where national provisions are adopted on the subject'.) The Court of Justice referred to the 'Basic Principles on the Independence of the Judiciary', adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan on 26 August to 6 September 1985, and to 'Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe, entitled 'judges: independence, efficiency and responsibilities', adopted on 17 November 2010 .

[64] This means that the level of that remuneration must be sufficiently high so as to protect judges against the risk of corruption. *Ibid*., para. 58. To that end, 'it is appropriate to compare the average remuneration of judges to the average salary in that State'. However, 'the principle of judicial independence [does not preclude] the remuneration of judges from being established at a level lower than that of the average remuneration of other legal professionals, in particular those exercising a liberal profession, such as lawyers, where they are clearly in a different situation from that of judges'. *Ibid*., paras 62 and 63.

principle of proportionality. Drawing on *Associação Sindical dos Juízes Portugueses*, the Court of Justice pointed out that no derogation can 'be specifically aimed at judges but [must] affect, more generally, the remuneration of other categories of officials or public servants'.[65] Similarly, compliance with the principle of proportionality requires that 'the derogating measure remains exceptional and temporary and does not undermine the commensurate nature of judges' remuneration with the importance of the functions they carry out'.[66]

Similarly, in *Rzecznik Praw Obywatelskich (Exclusion of a judge of the ordinary courts),*[67] the referring court had been called upon to rule on an application seeking the recusal of a judge, which was based on two circumstances. First, the judge in question had been appointed on the basis of a resolution adopted by the KRS in its new composition and, second, at the time of that judge's appointment, there was no effective remedy for candidates who had applied for the same judicial post. The referring court thus asked the Court of Justice whether such judge should, in the light of Article 19(1) TEU, be recused.

Referring to its previous case-law, the Court of Justice recalled that the referring court should carry out an 'overall assessment of all the relevant factors attending to [the] appointment [of the judge in

[65] *Ibid*., para. 69 (referring to judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117), para. 49.
[66] *Ibid*., para. 75.
[67] Judgment of 24 March 2026, *Rzecznik Praw Obywatelskich (Exclusion of a judge of the ordinary courts)*, C-521/21, EU:C:2026:242.

question]'.[68] It also pointed out that 'not every error that may take place during the procedure for the appointment of a judge is of such a nature as to give rise to doubts on the independence and impartiality of that judge'.[69] Relying on its established case-law, the Court found that the two circumstances, examined separately, fell short of the threshold required to raise such doubts.[70] Considered together, the outcome was no different, as three countervailing factors supported the independence and impartiality of the judge in question. First, prior to her appointment to judicial office, she had served as principal assistant to a judge of a Polish Regional Court. Second, the college of that regional court and the assembly of representatives of judges of the district courts at that regional court had issued a favourable opinion on her candidature. Third and last, the other candidates in the appointment procedure did not challenge the appointment of that judge. Thus, in the absence of any other adverse factor, the overall assessment favoured the dismissal of the recusal application.[71]

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[68] *Ibid*., para. 91 [referring to judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* , C-824/18, EU:C:2021:153, para. 132]

[69] *Ibid*., para. 76. (referring to judgments of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, para. 123)

[70] Regarding the KRS in its new composition, see *ibid*., para. 83 [referring to judgment of 22 February 2022, Openbaar Ministerie (Tribunal established by law in the issuing Member State), C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, para. 75]. Regarding the absence of effective judicial remedy, see *ibid*., para. 88 [referring to judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* , C-824/18, EU:C:2021:153, para. 129]

[71] *Ibid*., para. 92.

### *iv. Fourth Factor: The Incremental Approach*

*Fourth and last*, the Court follows an incremental approach (or as I have called it 'a stone-by-stone approach'),[72] when developing further the line of case-law on the rule of law. This is not a distinctive feature of that line of case-law, but rather a common characteristic of the Court of Justice's approach to developing constitutional principles of EU law. Just like a common law court, the Court will sometimes overrule previous case-law, whilst also distinguishing between cases.

For example, in *Banco de Santander*,[73] the Court departed from its previous findings in *Gabalfrisa and Others*,[74] in which it had held that the Spanish Central Tax Tribunal could be considered a 'court or tribunal' for the purposes of Article 267 TFEU. It held that those previous findings 'must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national body must meet [in order to have access to the preliminary ruling mechanism]'.[75] After looking at that recent case-law, the Court declared the order for reference made by the Spanish Central Tax Tribunal inadmissible, since that body was not sufficiently independent to be considered a 'court or tribunal' for the purposes of Article 267 TFEU.

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[72] K. Lenaerts, 'EU citizenship and the European Court of Justice's "stone-by-stone" approach' (2015) *International Comparative Jurisprudence* 1.
[73] Judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17).
[74] Judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145).
[75] Judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17), para. 55.

### *v. But There Are Still Questions of Principle in Hard Cases*

In my view, these four factors show that the case-law of the Court of Justice on the rule of law is gradually entering a new phase. Needless to say, this new phase does not rule out the fact that the Court will continue to decide questions of principle in hard cases, whose answers cannot be found in existing case-law.

Allow me to provide two examples in this regard.

In *Commission v Poland*, decided last December, the Court of Justice held that the Polish Constitutional Court had delivered two judgments which were incompatible with Article 19(1) TEU. In those two judgments, the Polish Constitutional Court had declared certain provisions of the Treaties, as interpreted by the Court of Justice, to be contrary to the Polish Constitution and had expressly described the Court's case-law on the right to effective judicial protection as exceeding jurisdiction conferred on it (*ultra vires*).

For the first time, this case brought the so-called *ultra vires* doctrine squarely before the Court of Justice for consideration. The reply of the Court was crystal clear: it held that national courts cannot unilaterally determine the scope and limits of the competences conferred on the EU, since the Court of Justice enjoys exclusive jurisdiction to give a definitive and binding interpretation of EU law. Judicial unilateralism simply has no room within the EU legal order. Instead, national courts must engage in a dialogue with the Court of

Justice by means of the preliminary ruling mechanism. Disagreements on the scope and meaning of EU law have to be solved by engaging in a constructive dialogue with the Court of Justice.

Moreover, in this case, the Court also ruled, for the first time, that a national constitutional court, namely the Polish Constitutional Court, no longer offered the guarantees of an independent and impartial court previously established by the law, within the meaning of the requirements flowing from Article 19(1) TEU.[76] Simply put, in the eyes of EU law, the Polish Constitutional Court was not a court.

The second example relates to *Commission v Hungary (Values of the European Union)*,[77] in which the Court of Justice held, for the first time, that Article 2 TEU, which contains the values on which the EU is founded, including respect for the rule of law, may operate as a stand-alone provision which imposes legally binding obligations upon the Member States.

However, the applicability threshold of Article 2 TEU, as a stand-alone provision, is quite high. The Court ruled, in that regard, that 'only manifest and particularly serious breaches of one or more values common to the Member States may give rise to [a violation of Article 2 TEU]'. But what does a 'manifest and particularly serious breach' mean for the purposes of Article 2 TEU? The very recent judgment of the Court in *Commission v Hungary (Values of the*

[76] Judgment of 18 December 2025, *Commission v Poland (Ultra vires review of the Court's case-law – Primacy of EU law)*, C-448/23, EU:C:2025:975.
[77] Judgment of 21 April 2026, *Commission v Hungary (Values of the European Union)*, C-769/22, EU:C:2026:326.

*European Union)* provides some useful indications. '[A]ny infringement of a provision of EU law which, directly or indirectly, gives concrete expression to those values' is not automatically a manifest and particularly serious breach of Article 2 TEU. Something more is required to meet the applicability threshold of that Treaty provision. In *Commission v Hungary (Values of the European Union)*, the Hungarian law in question met that threshold. This was because that law resulted – I quote – 'in the stigmatisation and marginalisation of non-cisgender or non-heterosexual persons, solely on the ground of their gender identity or sexual orientation, with those consequences being intensified by the fact that that law also makes an association between the fact of not being cisgender or not being heterosexual, on the one hand, and being convicted of paedophilia, on the other, suggesting that non-cisgender or non-heterosexual persons constitute a fundamental threat to Hungarian and European society; an association capable of encouraging the development of hateful conduct towards those persons'.[78]

## 2. *Between too much and not enough*

In this new phase, the challenge is now to find the right course by navigating between two opposite approaches: one *maximalist*

[78] *Ibid*., para. 554.

which would allow no room for national diversity and one *minimalist* which would deprive the rule of law of its substance.

In my view, the Court of Justice has managed to steer that course and I would like to illustrate this point by looking at the judgment of the First Chamber in *Inspektorat kam Visshia sadeben savet*,[79] three joined cases concerning the Bulgarian Inspectorate.

The Bulgarian Inspectorate is a judicial body, established by the Bulgarian Constitution, which is competent to scrutinise the activity of judges in the performance of their functions, carry out checks in respect of their integrity and the absence of conflicts of interest on their part, and propose the initiation of disciplinary proceedings to another judicial body. The Inspector General and the other inspectors are elected for five- and four-year terms, respectively, by a two-thirds majority in the Bulgarian Parliament.

The question that the referring court had posed in these cases was whether the principle of judicial independence prevented the Inspector General and the other inspectors from continuing to carry out their functions beyond the legal duration of their terms of office, and until the Bulgarian Parliament had elected new members.

The Court of Justice began by recalling its case-law on the rule of law in general, and its judgments relating to the Romanian

[79] Judgment of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303).

Inspectorate in particular.[80] In those judgments, the Court held, in essence, that 'the rules governing the disciplinary regime in respect of judges… must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions'.[81] The Court also recalled that 'a 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'.[82] In light of its broad powers to scrutinise the activity of judges, this applied to the Bulgarian Inspectorate, since the prospect of opening a disciplinary investigation is, as such, liable to exert pressure on those who have the task of adjudicating a dispute. Finally, referring to 'the test of appearances', the Court of Justice held that 'rules … governing the procedure for the appointment of [members of a judicial body such as the Bulgarian Inspectorate must] be designed in such a way that there can be no reasonable doubt, in the minds of individuals, that the

[80] See judgments of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393), and of 11 May 2023, *Inspecţia Judiciară* (C-817/21, EU:C:2023:391).

[81] Judgment of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303), para. 86 [referring to judgments of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393), para. 198 and of 11 May 2023, *Inspecţia Judiciară* (C-817/21, EU:C:2023:391), para. 48].

[82] Judgment of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303), para. 87 [referring to judgments of 18 May 2021, *Asociaţia 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393), para. 199 and of 11 May 2023, *Inspecţia Judiciară* (C-817/21, EU:C:2023:391), para. 49].

powers and functions of such a body will not be used as an instrument to exert pressure on, or political control over, judicial activity'.[83]

Next, the Court relied on this case-law in order to answer the question referred by the national court. It noted that the Member States are free to decide whether or not to authorise the performance, beyond the legal duration of their term of office, of members of a judicial body such as the Bulgarian Inspectorate. However, if they decide to do so, they must lay down 'an express legal basis in domestic law containing clear and precise rules such as to circumscribe [the] performance [of those functions]', 'excluding, in practice, the possibility that the extension of the terms of office may be indefinite in its duration'.[84] However, there was no such legal basis under Bulgarian law. Nor did it contain 'any legal provisions under which a potential deadlock in the process for the appointment of new members of the Inspectorate can be resolved, with the result that the extension of the terms of office of its former members appears, in practice, to be capable of continuing indefinitely'.[85] These normative lacunae ran contrary to the principle of judicial independence.

Finally, in an important obiter, the Court of Justice observed, referring to *Repubblika*, that in filling such lacunae, Bulgaria may not

[83] Judgment of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303), para. 88 [referring to judgment of 11 May 2023, *Inspecția Judiciară* (C-817/21, EU:C:2023:391), paras 50 and 51].
[84] Judgment of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303), paras 93 and 95.
[85] Judgment of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303), para. 92.

change its legislation or its Constitution 'in such a way as to bring about a reduction in the protection of the value of the rule of law'.[86]

In my view, in upholding the rule of law within the EU, the Court of Justice tries to strike the right balance between European unity and national diversity or, to put it differently, between 'too much and not enough'. EU law allows room for diversity, since the Member States are free to decide whether or not to authorise the performance, beyond the legal duration of their term of office, of members of a judicial body such as the Bulgarian Inspectorate. Moreover, EU law does not impose a single solution for resolving the situation of political deadlock at issue in those joined cases. However, EU law *does* safeguard European unity by requiring that the principle of judicial independence be respected: there must be an express legal basis for allowing members of the Inspectorate to remain in office once their mandate has expired; indefinite extensions of expired mandates are excluded, and existing normative gaps cannot be filled by further politicising the appointment procedure of inspectors as that would amount to a regression in value protection.

[86] Judgment of 30 April 2025, *Inspektorat kam Visshia sadeben savet* (C-313/23, C-316/23 and C-332/23, EU:C:2025:303), para. 96.

## V. Concluding remarks

EU law does not seek to impose a particular constitutional model. Time and again, the Court of Justice has stressed the fact that the organisation of the justice system falls within the competences of the Member States. Some Member States have administrative courts, others do not. Some have a Constitutional Court, others do not. Those choices are for the Member States – and for the Member States alone – to make according to their own history and tradition.

However, in the EU legal order, national justice systems are not insulated from interactions with other legal systems, as this conference will demonstrate. Vertically, by means of the preliminary ruling mechanism, national courts and the Court of Justice strive to secure the uniform interpretation of EU law. They work together to develop EU law as the law common to the 27 Member States. The uniform interpretation of EU law guarantees the equality of citizens before the law. Horizontally, this interaction seeks to establish an AFSJ by facilitating the free movement of judicial decisions. The cooperation between national courts in civil and criminal matters gives rise to the exterritorial application of national law.

Yet the vertical and horizontal interlocking of legal orders can take place only if EU Courts and national courts trust each other. Trust can arise only if those courts share the same degree of commitment to the values on which the EU is founded.

Compliance with the value of respect for the rule of law in general, and respect for judicial independence in particular, prevent the EU legal order from fragmenting. National courts are the building blocks of the EU judicial system. Without independent national courts, the whole system would simply collapse.

Most importantly, independent national courts are part of our identity as Europeans. Judicial independence must be protected at all times. As ‘the voice of the independent European judiciary’, the ENCJ must keep up the good work. There is still much to be done, so that future generations of Europeans see a strong and independent judiciary as part of their common identity.

Thank you very much.