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FOCUS

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Il Focus contiene i testi rivisti di alcune delle relazioni tenute in occasione del Convegno internazionale organizzato presso l'Universidad Pompeu Fabru di Barcellona (28/29 settembre 2020)

THE FUNDAMENTAL RIGHT TO AN EFFECTIVE JUDICIAL PROTECTION AND THE RULE OF LAW IN THE EU AND THEIR IMPACT ON MEMBER STATES' ADMINISTRATION OF JUSTICE

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I. Introduction

The aim of the following pages is to describe that the recognition of effective judicial protection carried out by the European Union has an impact on the regulation of the judicial organisation on Member States. It has an incidence, for example, on the measures regarding the appointment and cessation of judges' activity, or those concerning their remuneration amount, forced retirement or disciplinary regime. There is no doubt that the competence in order to regulate and act upon this matter is exclusively in the field of the competence of the State, which is reserved and not

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transferred by the States. However, for a little while now, the Court of Justice is clearly giving out the signal that the national measures regarding the organisation of the Administration of Justice cannot be contrary to the regulation of judicial protection as recognised by the European Union. This regulation acts as parameter or review of State measures.

Effective judicial protection was first recognised as a general principle of the European Union Law, and afterwards it was set out in article 47 of the Charter of Fundamental Rights of the European Union (CFREU) and in article 19.1 of the Treaty on the European Union (TEU), in connection with the rule of law value of article 2 of the same Treaty. Whereas the article of said Charter enshrines effective judicial protection as a fundamental right which corresponds to all *persons*[1], the second subparagraph of article 19.1 of TEU recognises it as an objective, structural or systemic principle of the EU legal order, a principle that is to be guaranteed to the *Member States*[2]. In fact, it can be said that both texts refer to the two dimensions that the fundamental right presents to effective judicial protection[3]. The Charter reflects mostly the subjective or personal dimension of this fundamental right and refers to the claim of every person of receiving judicial protection in relation with the corresponding rights and interests in a specific situation. TEU, for its part, refers to the objective or systemic dimension of the fundamental right, on which it operates as a principle or structural value of power organisation and constitutional order, by characterising it. An objective dimension that, in the case of effective judicial protection, appears to be directly linked to the existence of rule of law.

The idea of this article is to describe how this objective dimension of the fundamental right to effective judicial protection is acting (albeit in connection with Article 47 of the Charter) as a limit to national measures relating to the administration of justice. In other words, how this dimension is allowing judicial review (or control) of these measures; a judicial control that uses European Union law (that relating to effective judicial protection) as a parameter or measure of judgment (review or control of Europeanness). In the following pages, there will be a discussion on which legal

[1] Article 47 CFREU: "*Everyone* whose rights and freedoms guaranteed by the law of the Union are violated has the *right to an effective remedy* (…)"; "*diritto a un ricorso effettivo*" (IT); "derecho a la tutela judicial efectiva" (ES); "Recht auf einem wirksamen Rechtsbehelf" (DE); etc.

[2] Article 19.1 (2) TEU: "*Member States* shall provide remedies sufficient to ensure *effective legal protection* (…)"; "tutela giurisdizionale effettiva" (IT); "tutela judicial efectiva" (ES); "ein wirksamer Rechtsschutz" (DE); etc.

[3] Fundamental rights have, as it is known, a double dimension or aspect: one is subjective and the other one is objective or systemic. In the subjective dimension, the fundamental rights are claims, faculties or freedoms that the persons can pursue in specific situations. But, on the other hand, in a non-exclusive manner, but rather simultaneously, the fundamental rights have also an objective dimension, as they materialise or operate as basic values or structural elements of the power organisation and of the constitutional order, by characterising it. Hence the existence – beyond any specific legal situation – of a "general duty of protection and promotion of fundamental rights by the public powers". A duty that is based on various mechanisms, from the control channels of constitutionality of laws until the interpretation obligation according to them. Cf. L. DÍEZ-PICAZO, *Sistema de derechos fundamentales*, 4th ed., Madrid, 2013, p. 20.

bases, in which cases and with which mechanisms is taking place such incidence and this "Europeanness review".

II. The recognition of effective judicial protection in the European Union

EU law did not recognise the fundamental right to effective judicial protection until the Court of Justice started to do so, by affirming that the respect or existence of the said right is a general principle of EU/Community law. For example, this happened in the cases of *Johnston*[4] or *Heyens et alii*[5], before the proclamation of the EU Charter of Fundamental Rights of the European Union or CFREU, in *UPA*[6] or in *Unibet*[7], once this Charter had been proclaimed, or also, when it had already come into force (2009), among the others, in *Arango*[8] or *Kadi*[9]. The Charter, as noted, covered and reaffirmed said right in its article 47 ("Right to an effective remedy and to a fair trial"), the first paragraph of which states: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"[10].

In conjunction with this, the Court has been affirming that "under the principle of cooperation laid down in the Treaty, it is for the Member States to ensure judicial protection of individuals rights under Community law"[11], and likewise, that given the

[4] Court of Justice, judgment of 15 May 1986, case C-222/84, in which it was recognised as said general principle the existence of a jurisdictional control in order to invoke the rights recognised by EU law before the national courts, as well as the right to obtain an effective remedy before a judicial body (parr.18 and 19).

[5] Court of Justice, judgment of 15 October 1987, case C-222/86, by recognising the requirement of a remedy of a judicial nature as general principle of Community Law (par. 14 and 15).

[6] Court of Justice, judgment of 25 July 2002, case C-50/00 P, *Unión de Pequeños Agricultores/Council*, a judgment which states that "Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" (par. 39).

[7] Court of Justice, judgment of 13 March 2007, case C-432/05, par. 37.

[8] Court of Justice, judgment of 28 February 2013, case C-334/12, par. 40.

[9] Court of Justice, judgment of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, parr. 97 *et seq*,; see, also, judgment of 21 November 2019, case C-379/18, *Deutsche Lufthansa SA*, parr. 56 *et seq*.; or judgment of 5 November 2019, case C-192/18, *Commission/Poland*, par. 100 (and case-law mentioned therein).

[10] Said articles still affirms, in its second paragraph: "Everyone is entitled to a fair and public hearing within a reasonable time *by an independent and impartial tribunal previously established by law*. Everyone shall have the possibility of being advised, defended and represented." (emphasis added).

[11] Judgment *Unibet*, cit., par. 38, by referring to previous Judgments: *Rewe*, dated 16 December 1976, 33/76, par. 5; *Comet*, dated 16 December 1976, 45/76; *Simmenthal*, of 9 March 1978, 106/77, parr. 21 and 22; *Factortame*, dated 19 June 1990, C-213/89, par. 19; *Peterbroeck*, dated 14 December 1995, case C-312/93, par. 12. This is a protection that, as already mentioned in *Rewe* case-law, it has to be according to the principles of equivalence and effectiveness. Regarding the recognition of the effective judicial protection in EU law and its evolution, see, for example: M. BONELLI, *Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature*, in *Review of European Administrative Law*, 2, 2019, pp. 37 *et seq*.; G. D'AVINO and A. MARTONE, *Il diritto ad un ricorso effettivo e ad un giudice*

inexistence of a EU regulation on this subject, "it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law"[12]. In this same line, and in more recent words, the Court will reiterate with some assiduity that "it is for the Member States to establish a system of legal remedies and procedures which *ensure respect for the right to effective judicial protection*"[13]. And this crucial idea, with jurisprudence origin, will be then included in said article 19.1 (2) TEU, by means of the Treaty of Lisbon reform. Such reform, signed in 2007, and that came into force in December 2009, will also be important because "rule of law" is recognised as one of the values on which the EU is based pursuant to article 2 TEU (notwithstanding the existence of previous references to it, for example, in TEU and Charter Preambles[14]). Such contributions to the Treaty of Lisbon in relation with articles 2 and 19.1 TEU and 47 CFREU are the ones that have led to the consideration that it has promoted in this way the "constitutionalisation" of effective judicial protection in EU law[15].

III. The strengthening of the objective dimension of effective judicial protection in the European Union. Elements

On that note, it is important to highlight that, for the last two years, a new and notable step towards the recognition of the fundamental right to effective judicial protection in the EU has been taking place. We could say that this consists in strengthening its objective, systemic or structural dimension, which appears, said in a schematic way, in the connection of effective judicial protection with the Rule of Law

imparziale ex art. 47 della Carta dei diritti fondamentali, in A. DI STASI, *Spazio europeo e diritti di giustizia. Il capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenzial*e, Padova, 2014, pp. 140 *et seq*.

[12] Judgment *Unibet*, *cit*., par. 39, by referring to the previous Judgments: *Rewe*, *cit*., par. 5; *Peterbroeck*, *cit*., par. 12; *Safalero*, dated 11 September 2003, C-13/01, par. 49.

[13] *UPA, cit.*, par. 41; judgment of 1 April 2004, case C-263/02 P, *Commission/Jégo-Quéré*, par. 31; or judgment of 3 October 2013, case C-583/11 P, *Inuit Tapiriit Kanatami*, par. 100.

[14] Or of the Court of Justice judgment of 23 April 1986, C-294/83, *Partie Ecologiste 'Les Verts' v. European Parliament* already characterised the European Economic Community as "a Community based on the rule of law" par. 23 [see also *Opinion 1/91* of CJEU, of 14 December 1991, in which there is the statement that the EEC Treaty "constitutes the constitutional charter of a Community based on the rule of law" (par. 21)].

[15] See, for example: M. BONELLI, "Effective Judicial Protection in EU Law...", *op. cit.,* pp. 35-36. On the recognition in primary law: A. MARTÍNEZ-SANTOS, "Sobre los orígenes del principio de protección judicial en la jurisprudencia del Tribunal de Justicia y las consecuencias de su inclusión formal en el Derecho primario de la Unión", in M. AGUILERA MORALES (Dir.), *Tribunal de Justicia de la Unión Europea, justicia civil y derechos fundamentales*, Cizur Menor, 2020, pp. 280 *et seq*.

value, with judicial independence as an essential requirement[16]. This is a dimension that can be asserted before national measures or provisions that oppose to it.

Such strengthening has been built up by means of a set of Judgments of the CJ, which started in 2018 with the *Judgment Associação Sindical dos Juízes Portugueses (or ASJP)*[17], and continues, mainly, with other four judgments which form its case-law progenie: *Minister for Justice and Equality*[18], two judgments in relation to significant proceedings related to Republic of Poland's failure (*Commission/Poland*)[19] and *A.K. et alii*[20] (decisions that will be later discussed).

These decisions recall that the fundamental right to effective judicial protection of the rights that the legal system confers to the litigants is a general principle of EU Law which arises from the common constitutional traditions of the Member States, which has also been consecrated in articles 6 and 13 of the European Convention of Human Rights and that is currently recognised in said article 47 of the Charter. Likewise, there is a statement that begins to play an important role and it is noted that it is also a principle that is referred in the second subparagraph of article 19.1 TEU, when providing that: "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*"[21]. Previously, we should also highlight that the first subparagraph of said article has provided that the Court of Justice of the European Union[22] "shall ensure that in the interpretation and application of the Treaties the law is observed"[23].

By means of this case-law saga or series, the Court develops and repeats an "argumentative sequence" formed by three ideas, and the three of them are based on the creative interpretation of article 19.1 (2) TEU (in connection with article 2 TEU and article 47 CFREU), which appears – somehow or other – in all Judgments and that has as an effect the above-mentioned strengthening. The first idea states that the mission of

[16] On the fact that effective judicial protection, apart from operating as a procedural principle, has been acquiring a nature of substantial and structural principle, with broad constitutional relevance, see: M. BONELLI, "Effective Judicial Protection in EU Law...", *op. cit.,* pp. 35 *et seq*. and 45 *et seq*.

[17] Court of Justice, Grand Chamber, judgment of 27 June 2018, *Associação Sindical dos Juízes Portugueses contra Tribunal de Contas*, case C-64/16. In any case, we can consider there are some indications in the contents of this case-law regarding effective judicial protection in previous Judgments as: *Rosneft* (dated 28 March 2017, C-72/15, parr. 75 *et seq.*) or *Achmea* (dated 6 March 2018, C-284/16, parr. 36 or 55).

[18] Court of Justice, Grand Chamber, judgment of 25 July 2018, case C-216/18 PPU (also known as *LM*).

[19] Court of Justice, Grand Chamber: judgment of 24 June 2019, *Commission/Poland*, case C-619/18 (EU:C:2019:615) and judgment of 5 November 2019, *Commission/Poland*, case C-192/18 (EU:C:2019:924).

[20] Court of Justice, Grand Chamber, judgment of 19 November 2019, joined cases C-585/18, 624/18 and 625/18.

[21] By reflecting, as previously said, only implicitly the crucial role performed by the national judge in the European judicial structure (R. ALONSO GARCÍA, *Sistema jurídico de la Unión Europea*, 'EU legal system', Madrid, 2014, p. 203).

[22] The *institution* "Court of Justice of the European Union" (CJEU) formed by the *bodies* "Court of Justice" (CJ), "General Court" (GC) and "specialised courts".

[23] Article 19.2 will specify the composition of the CJ and the GC, as well as rules regarding election of judges that form it as well as Advocates-General that assist to the former. The third section refers to the matters on which the TJEU has ruling competence.

guaranteeing judicial review in the EU legal system is a mission which corresponds also to the "national Judge"; in the second place, the existence of an inseparable link between effective judicial protection and the "Rule of Law"; and finally, that the national judicial bodies that act in fields covered by EU law shall comply with the requirements of judicial protection, among which the Court currently highlights judicial independence. The three interconnected ideas are based – although not exclusively – on article 19.1 (2) TEU.

III.1. The national Judge as guarantor of judicial review in the EU legal system

The first idea or element in the argumentative sequence consists in the fact that, according to CJ, article 19.1 (2) TEU "entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals"[24].

As established in said article, it falls within the Member States to establish an appropriate system of legal remedies and procedures in order to guarantee said review and effective judicial protection within the fields covered by EU law [an idea that had already been recognised – as already seen – in the previous case-law regarding said right, and it is confirmed, likewise, in decisions given after its incorporation in article 19.1 (2) TEU by the Lisbon reform [25]].

Nevertheless, as previously said, for the Court this article implies now, *likewise*, beyond its wording, that the function of "ensuring that in the interpretation and application of the treaties the law is observed"[26] corresponds to the "national Judge", "in collaboration with" the CJ. In other words, "it is for the national courts and tribunals

[24] *ASJP, cit.*, 32 [quoting also its *Opinion* 1/09 (*Agreement on the creation of a Unified Patent Litigation System*), of 8 March 2011, par. 66; and judgments: *Inuit Tapiriit Kanatami*, *cit*., par. 90, and *T & L Sugars*, judgment of 28 April 2015, case C-456/13 P, par. 45]. See also, on that regard, for example: M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial en el derecho de la Unión Europea*, *Revista de Derecho Comunitario Europeo,* 65, 2020, p. 12. In contrast, it can also be interesting to recall that the Advocate-General Henrik Saugmandsgaard ØE had a contrary idea regarding the Opinion delivered on 17 May 2017, case C-64/16, *ASJP* when stating in the second subparagraph of article 19.1 "*is not aimed directly at the national judges*, but is intended to ensure that possibilities of remedies exist in the Member States so that each individual is able to benefit from such protection in all the fields in which EU law is applicable. That requirement is linked with the fact that judicial review of compliance with the legal order of the European Union is ensured not only by the Courts of the European Union, but also in cooperation with the national courts, in accordance with the two subparagraphs of that paragraph" (par. 61; emphasis added).

[25] Cfr. Judgments of the CJEU: *Inuit Tapiriit Kanatami*, *cit*., parr. 100 and 101; *ASJP, cit*., par. 34; *Commission/Poland* (C-619/18), *cit*., par. 48; *Commission/Poland* (C-192/18), *cit*., par. 99; Court of Justice, Grand Chamber, judgment of 26 March 2020, *Miasto Łowicz*, joined cases C-558/18 and 563/18, par. 32; or Order of the CJEU *Commission/Poland* (C-791/19 R), *cit*., par. 30. In Judgment *A.K. and Others* (*cit*.), however, this matter is also linked to article 47 CFREU (par. 115).

[26] *ASJP, cit.*, par. 33 (quoting, in turn, its *Opinion* 1/09, *cit*., par. 69; and *Inuit Tapiriit Kanatami*, *cit*., par. 99).

and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law"[27].

III.2. The inseparable link between effective judicial protection and "rule of law"

The Court of Justice connects in a reiterated manner the interpretation of the effective judicial protection of article 19.1 (2) TEU and – to a lesser extent – of 47 CFREU with the statement of the "Rule of Law" value recognised in article 2 TEU[28]. Once recalled that, according to said Article, the European Union "is founded on values, such as the rule of law, which are common to the Member States in a society in which, *inter alia*, justice prevails"[29], and that such Union is "a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act"[30], the CJ affirms, in each mentioned judgment, that article 19 TEU provides a "concrete expression to the value of the rule of law stated in Article 2 TEU"[31]. And likewise, it

[27] Judgment *Minister for Justice and Equality, cit*., par. 50 [quoting, in turn, said *ASJP*, *cit*., par. 32, and Judgment *Achmea*, *cit*., par. 36); also in: *Commission/Poland* (C-619/18), *cit*., par. 47; *Commission/Poland* (C-192/18), *cit*., par. 98; *A.K. and Others, cit*., par. 167; or Order of the CJEU in the proceedings for interim measures in the case *Commission/Poland*, dated 8 April 2020, case C-791/19 R, par. 30.

[28] Cfr. M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial…, op. cit.,* p. 12; M.J. GARCÍA-VALDECASAS DORREGO, *El Tribunal de Justicia, centinela de la independencia judicial desde la sentencia Associação Sindical dos Juízes Portugueses (ASJP)*, in *Revista Española de Derecho Europeo*, 72, 2019, III.3; J. TEYSSEDRE, *La judiciarisation du contrôle du respect de l'état de droit*, in *Revue trimestrielle de droit européen,* 56, 2020, n. 1, pp. 26 *et seq*.; L.S. ROSSI, *La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'Union européenne et remèdes juridictionnels*, in *Revue Trimestrielle de droit européen, juillet* – September 2020, pp. 639 *et seq.* On the association of article 2 with other TEU provisions – as the one regarding effective judicial protection – which create an effect of "mutual amplification" of the combined provisions: A. VON BOGDANDY and L.D. SPIEKER, *Contra los jueces que silencian las críticas. Los valores del artículo 2 T. Reverse Solange y las responsabilidades de los jueces nacionales*, in A. VON BOGDANDY, J.I. UGARTEMENDIA, D. SARMIENTO and M. MORALES, *El futuro de la Unión Europea. Retos y desafíos,* IVAP/MPIL, Oñate (ongoing edition), II.1 *in fine* and 2; of the same authors: *Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges*, in *European Constitutional Law Review*, 15, 2019, n. 3, pp. 391 *et seq*. In accordance to article 2: "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". For analysis purposes in relation to said article, specially the value of Rule of Law, and its normative and actionable value, see, among many others, J. MARTÍN Y PÉREZ DE NANCLARES, *La Unión Europea como comunidad de valores: a vueltas con la crisis de la democracia y del Estado de Derecho*, in *Teoría y Realidad Constitucional*, 43, 2019, pp. 121-159; L.D. SPIEKER, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, in *German Law Journal*, 20, 2019, pp. 1182-1213; A. VON BOGDANDY and L.D. SPIEKER, *Contra los jueces que silencian las críticas…*, *op. cit*.; also by the first of the two above: *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace*, in *European Constitutional Law Review* 14, 2018, pp. 675-699.

[29] Judgment *ASJP, cit.*, par. 30.

[30] Judgments of the CJEU *ASJP, cit.*, par. 31; *Minister for Justice and Equality, cit*., par. 49.

[31] Judgments of the CJEU: *ASJP*, *cit*., par. 32 (added emphasis) *Minister for Justice and Equality, cit*., par. 50; *Commission/Poland* (C-619/18), *cit*., par. 47; *Commission/Poland* (C-192/18), *cit*., par. 98; *A.K.*

insists on the idea that "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law"[32]. There is no Rule of Law without effective judicial protection, which in the European Union, with regard to the areas covered by EU law, corresponds to guarantee also to the national judicial bodies.

This connection between effective judicial protection and Rule of Law, which as we will see appears indivisibly associated to judicial independence[33], will be precisely what forms this objective or structural dimension of the FR to effective judicial protection that we have been discussing. As also highlighted by the European Commission, "*the core of the rule of law is effective judicial protection, which requires the independence, quality and efficiency of national justice systems*"[34]. That said, and prior to focusing on this matter of judicial independence, it is also interesting to point out briefly that this Rule of Law value, whose core is effective judicial protection, despite being itself a value, it also answers the achievement of other objectives or purposes.

The European Commission emphasizes very significantly that the Rule of Law value enshrined in article 2 TEU is "a prerequisite for the protection of all the other fundamental values of the Union, including for fundamental rights and democracy" and that its respect "is essential for the very functioning of the EU: for the effective application of EU law, for the proper functioning of the internal market, for maintaining an investment-friendly environment and for mutual trust"[35].

The Court of Justice itself underlines in said case-law that "*mutual trust between the Member States and, in particular, their courts and tribunals i*s based on the fundamental premise that Member States share a set of common values on which the

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and Others, cit., par. 167; or Order of the CJEU *Commission/Poland* (C-791/19 R), *cit*., par. 32. See also on this matter, for example: J.M. CORTÉS MARTÍN, *Sorteando los inconvenientes del artículo 7 TUE: el advenimiento del control jurisdiccional del Estado de derecho*, in *Revista de Derecho Comunitario Europeo,* 66, 2020, pp. 473 *et seq*., especially 487 *et seq*.

[32] Judgments of the CJEU: *ASJP*, *cit*., par. 36 (by quoting the previous Judgment *Rosneft*, *cit*., par. 73); *Minister for Justice and Equality, cit*., par. 51; or *A.K. and Others, cit*., par. 114. See, also: L. BADET, *À propos de l'article 19 du Traité sur l'Union Européenne, pierre angulaire de l'action de l'Union Européenne pour la sauvegarde de l'État de droit*, in *Cahiers de droit européen*, 2020, pp. 57 *et seq*., especially 75 and 76.

[33] As stated by CJEU: "*That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded*" [Judgment *Commission/Poland* (C-192/18), *cit*., par. 106, emphasis added; reference is made to the previous judgments: *Minister for Justice and Equality, cit*., parr. 48 and 63; *Commission/Poland* (C-619/18), *cit*., par. 58]; *A.K. and Others, cit*., parr. 120 and 124.

[34] Within its official website, heading the section *Upholding the Rule of Law* (for initiatives, actions, communications, etc. of the Commission to uphold the "Rule of Law", in which there are also data and corporate scoreboards on independence, quality and efficiency of national justice systems: *EU Justice Scoreboard;* etc.): https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law_en.

[35] *Upholding the Rule of Law*, *ibidem*.

European Union is founded, as stated in Article 2 TEU"[36]. And in this same line, that "both the principle of mutual trust between the Member States and the principle of mutual recognition, which is itself based on the mutual trust between the latter (…), are, from EU law's perspective, of fundamental importance given that they allow an area without internal borders to be created and maintained"[37]. And also, there is no lack also of academic studies in which it is shown that effective judicial protection constitutes a "concrete expression of the principle of effectiveness of EU law"[38], or those in which it is stated that the Court uses EU's constitutional value of respect for the rule of law as point of reference for asserting its own jurisdiction[39].

III.3. EU Effective judicial protection requirements to be met by the "court or tribunal": judicial independence as crucial requirement

As CJ highlights insistently: "every Member State must, under the second subparagraph of Article 19.1 TEU, in particular ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law and which, therefore, are liable to rule, in that capacity, on the application or interpretation of EU law, meet the requirements of *effective judicial protection*"[40].

First and foremost, it has to be considered that the Court makes reference to the idea of "courts or tribunals" in the sense defined by EU law, which demands to meet a series of requirements. Specifically: "*inter alia*, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent"[41]. As will be seen, these are the same requirements that, according to settled case-law of the Court

[36] Judgments of the CJEU: *ASJP, cit.*, par. 30 [by quoting, in this sense, its previous *Opinion* 2/13 on the Accession to the European Union to ECHR, 18 December 2014, section 168] added emphasis; *Minister for Justice and Equality, cit*., par. 35 (by quoting its previous Judgment *Achmea*, *cit*., par. 34); *Commission/Poland* (C-619/18), *cit*., par. 42.

[37] Judgment *Minister for Justice and Equality, cit*., par. 36.

[38] On this matter: P. ZINONOS, *Judicial Independence & National Judges in the Recent Case Law of the Court of Justice*, in *European Public Law*, 4, 2019, pp. 623 *et seq*. or 626 [bringing up the idea by Advocate General J. Kokott, in which the principle of effective judicial protection (as requirement in order that the rights granted by the Community Law can be exercised before the courts) is a "simple expression of the principle of effectiveness" (Opinion delivered on 22 January 2009, in the case C-75/08, *Mellor*, EU:C:2009:32, par. 28)].

[39] P. VAN ELSUWEGE and F. GREMMELPREZ, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, in *European Constitutional Law Review*, 16, 2020, p. 10. Such authors will show that the respect for the Rule of Law was already playing an important rule in the case-law of the Court, long before the concept was explicitly mentioned in EU Treaties (on the base of common constitutional traditions of the Member States); and that the Treaty of Lisbon will foster the substantial reinforcement of the constitutional role played by the same as cornerstone of the legal system in the EU (pp. 11 *et seq*.)

[40] Judgments of the CJEU: *Commission/Poland* (C-192/18), *cit*., par. 103 (emphasis added); *ASJP, cit*., par. 37; *Minister for Justice and Equality, cit*., par. 52; *Commission/Poland* (C-619/18), *cit*., par. 55; Order of the CJEU *Commission/Poland* (C-791/19 R), *cit*., par. 31.

[41] *ASJP, cit*., par. 38.

of Justice itself, have already been required in order to explain if a national body has the status of «court or tribunal» for the purposes of referring a question to preliminary ruling under article 267 TFEU[42].

After the previous description, the Court will underline that, among the requirements to guarantee effective judicial protection (which are not listed), "maintaining such a court or tribunal's independence is essential"[43]. It states, in this sense, that this requirement on judicial independence "which is inherent in the task of adjudication, (…) is required not only at EU level as regards the Judges of the Union and the Advocates-General of the Court of Justice, as provided for in the third subparagraph of Article 19.2 TEU, but also at the level of the Member States as regards national courts"[44]. An independence requirement of the national judicial bodies based on article 19.1 TEU[45], which "is essential" and indispensable as well for the proper functioning of the judicial cooperation system which is inherent within the mechanism for requesting preliminary rulings enshrined in article 267 TFEU[46].

Having said that, the CJ will recall time and again the existing interrelation between judicial independence, effective judicial protection and Rule of Law, three connected and interdependent requirements. In particular, it affirms that the "requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded"[47].

Focused on the identification of its contents, the Court strives to detail that the "requirement that courts be independent", a requirement which the Member States must — under article 19.1 (2) — ensure it is observed in respect of national courts[48], covers two aspects. The first, "which is external in nature, presupposes that the court

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[42] In this sense, for instance, Judgments of the CJEU: *Syfait and others*, judgment of 31 May 2005, case C-53/03, par. 29; *Torresi*, 17 July 2014, joined cases C-58/13 and C-59/13, par. 17; *Consorci Sanitari del Maresme*, 6 October 2015, case C-203/14, par. 17; *Panicello*, 16 February 2017, case C-503/15, par. 27; *Banco de Santander S.A.*, judgment of 21 January 2020, case C-274/14, par. 51. On this subject: M.J. GAROT, *Acerca del concepto de 'independencia judicial' en la reciente jurisprudencia del Tribunal de Justicia de la Unión Europea*, in M. AGUILERA MORALES (Dir.), *Tribunal de Justicia de la Unión Europea, justicia civil y derechos fundamentales*, Cizur Menor, 2020, pp. 187 *et seq*.

[43] *ASJP, cit*., par. 41; *Minister for Justice and Equality, cit*., par. 52 and 53; *Commission/Poland* (C-619/18), *cit*., par. 57; *Commission/Poland* (C-192/18), *cit*., par. 105.

[44] Judgments of the CJEU: *ASJP, cit*., par. 42; *Escribano Vindel*, 7 February 2019, case C-49/18, par. 65.

[45] R. BUSTOS GISBERT states that the use of article 19 TEU, regarding independence matters, "constitute a radical novelty in Luxembourg's case-law", converting itself "into the support point which will enable the revolution" started by Judgment *ASJP* and the case-law deriving from the same (*Comunicación transjudicial en Europa en defensa de la independencia de los jueces*, in *Revista de Derecho Constitucional Europeo*, 33, 2020, p. 17).

[46] *ASJP, cit*., par. 43; *Minister for Justice and Equality, cit*., par. 54; *Miasto Łowicz, cit.,* par. 59. On this matter, for example: P. ZINONOS, *Judicial Independence & National Judges…*, *op. cit.,* pp. 620-621.

[47] *Commission/Poland* (C-619/18), *cit*., par. 58; *Minister for Justice and Equality, cit*., par. 48 and 63; *Commission/Poland* (C-192/18), *cit*., par. 106; *A.K. and Others, cit*., par. 120.

[48] For example: *Commission/Poland* (C-619/18), *cit*., par. 71.

concerned exercises its functions 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, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions"[49]. It recalls also that judicial irremovability from office constitutes an inherent guarantee to judicial independence in its external dimension, "appropriate for protecting the person of those who have the task of adjudicating in a dispute"[50]. The second aspect, "which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law"[51].

In any case, both orders or dimensions take form, for the Court, in the existence of rules, "rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it"[52]. And the same states concerning irremovability[53], the system of remuneration[54] or the guarantees in relation with the disciplinary measures to be applied, where appropriate, to the one who has a judging mission[55]. As we will observe in the following section, these are rules, which specified according to standards indicated by EU law and ultimately by the CJ, are mandatory for Member States.

Among various conclusions which shall be deduced from the previous pages, there is one which deserves to be highlighted now; the one concerning the "structural" dimension which achieves "judicial independence" in the last case-law of the CJ which we have previously mentioned. As clearly stated by Full Professor Paz Andrés, even "the CJEU has traditionally dealt with the independence of the judiciary with reference

[49] Judgments of the CJEU: *Minister for Justice and Equality, cit*., par. 63 (as already mentioned in Judgment *ASJP, cit*., par. 44) added emphasis; *Commission/Poland* (C-619/18), *cit*., par. 72; *Commission/Poland* (C-192/18), *cit*., par. 109; *Banco de Santander S.A*., *cit*., parr. 57 *et seq*.

[50] Judgments of the CJEU: *Minister for Justice and Equality, cit*., par. 64 (a recall to the previous Judgment: *Wilson*, 19 September 2006, case C-506/04, par. 51); *Commission/Poland* (C-619/18), *cit*., parr. 75 and 76; *Commission/Poland* (C-192/18), *cit*., parr. 112 and 113; *Banco de Santander S.A*., *cit*., parr. 58 *et seq*.

[51] Judgments of the CJEU: *Minister for Justice and Equality, cit*., par. 65 added emphasis; *Commission/Poland* (C-619/18), *cit*., par. 73; *Commission/Poland* (C-192/18), *cit*., par. 110; *Banco de Santander S.A*., *cit*., par. 61 (a recall to the previous Judgment *Panicello*, *cit*., par. 38).

[52] Judgments of the CJEU: *Minister for Justice and Equality, cit*., par. 66; *Commission/Poland* (C-619/18), *cit*., par. 74; *Commission/Poland* (C-192/18), *cit*., par. 111; *A.K. and Others, cit*., par. 123; *Banco de Santander S.A*., *cit*., par. 63; or in Order of the CJEU *Commission/Poland* (C-791/19 R), *cit*., par. 65.

[53] For instance, Judgments of the CJEU: *Commission/Poland* (C-619/18), *cit*., par. 76; *Commission/Poland* (C-192/18), *cit*., par. 113.

[54] Cfr. Judgments of the CJEU *ASJP, cit*., parr. 45 *et seq.*; *Escribano Vindel, cit.,* parr. 66 *et seq*.

[55] Judgments of the CJEU: *Minister for Justice and Equality, cit*., par. 67; *Commission/Poland* (C-619/18), *cit*., par. 77; *Commission/Poland* (C-192/18), *cit*., par. 114; *A.K. and Others, cit*., par. 123; Order of the CJEU *Commission/Poland* (C-791/19 R), *cit*., parr. 34 and 35.

to the notion of "national court or tribunal" in connection with Article 267 TFEU and with the power or ability of domestic judicial authorities to request preliminary rulings (…), [in] its recent case law, the Court of Justice is beyond this narrow approach. It has moved from this specific vision tied to the EU notion of national court or tribunal (characterized by a certain degree of flexibility aimed at encouraging judicial dialogue), to a constitutional dimension whereby, through a creative interpretation of the second subparagraph of Article 19.1 TEU, considers that the principle of judicial independence is inherent to this provision"[56]. In this same vein, P. Zinonos, states that "because of its indivisible link with the principle of effective judicial protection", judicial independence "manifests a structural obligation of the Member States under article 19, paragraph 1, subparagraph 2, TEU, and it becomes a component of full effectiveness of Union law"[57].

IV. The objective dimension of the fundamental right to effective judicial protection in the EU as review parameter of "europeanness" of the national measures regarding judicial administration

The main idea to be stated in this section consists in underlining that the objective dimension of the fundamental right to effective judicial protection, a dimension which is particularly linked to article 2 (Rule of Law value) and article 19.1 (2) TEU, and materialised in the requirement of guaranteeing judicial independence, is being used as a review parameter of Europeanness before the actions of the State Members that oppose thereto. Concretely, it is normally before national measures regarding the organisation and functioning of the Judiciary which would infringe it. This is how the Court of Justice has proceeded in different resolutions, and also other subjects such as national judicial bodies (by raising preliminary rulings which, in the end, go in this direction) or the European Commission (by taking legal actions due to failure).

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[56] P. ANDRÉS SÁENZ DE SANTA MARÍA, *Rule of Law and judicial Independence in the light of CJEU and ECtHR Case Law*, in C. IZQUIERDO SANS, C. MARTÍNEZ CAPDEVILA and M. NOGUEIRA GUASTAVINO (eds.), *Fundamental Rights Challenges - Horizontal Effectiveness, Rule of Law and Margin of National Appreciation,* Springer, 2021, par. 1. In this sense, it is not surprising that the CJ has strengthened the independence requirement when identifying, according to EU law, what is or what is not a "judicial body" for the purposes of requesting for a preliminary ruling of article 267 TFEU. This occurred in case *Banco de Santander S.A.* (*cit.*), where, by invoking said Judgments *ASJP* and *Commission/Poland* (C-619/18), the Court denied the condition of judicial body for the effects of raising a preliminary ruling to the Spanish Central Economic Administrative Court, with a clear *overruling* regarding the previous case-law in respect thereof (case *Gabalfrisa and others*, 21 March 2000, C-110/98 a 147/98). On this matter, a prognostication of the change: M.J. GARCÍA-VALDECASAS, *El Tribunal de Justicia, centinela…*, *op. cit.*, p. 86; see also, P. ANDRÉS SÁENZ DE SANTA MARÍA, who puts emphasis on the fact that, even if this can be explained from a Rule of Law perspective, it is not very much explicable from a preliminary ruling view, since it excludes from the dialogue with the CJ various bodies which up to present had this possibility (*ibidem*., par. 1.2.3 *in fine*); P. CONCELLÓN FERNÁNDEZ, *El concepto de órgano jurisdiccional nacional: una noción en permanente revisión*, in *Revista de Derecho Comunitario Europeo,* 66, 2020, pp. 629 *et seq*.

[57] P. ZINONOS, *Judicial Independence & National Judges…*, *op. cit.,* p. 623.

In the following pages, we will highlight three matters in relation with the idea of using a common European standard on effective judicial protection as a review measure: in the first place, the national scope of action in which there is this European standard; in the second place, we will describe succinctly the main cases in which such review has been produced or activated, by identifying the used parameter and the reviewed national measure; and finally, we will note in a telegraphic way different ideas regarding the review mechanisms that are being used in order to carry out this Europeanness review in defence of the objective dimension of effective judicial protection in the European Union.

IV.1. The scope of effective judicial protection recognised by EU law

When does effective judicial protection recognised by EU law come into play? When are the Member States and their judicial bodies linked and regulated by its contents? The Court of Justice has answered to this question by stating that, regarding its scope of application, the second subparagraph of article 19.1 TEU "refers to the «fields covered by EU law», irrespective of whether the States are implementing Union law within the meaning of article 51.1 of the Charter"[58].

In relation with the above, the Court affirms as well that this provision of article 19 is applicable to any national instance that "*may rule*, as a court or tribunal, (…) on questions concerning the application or interpretation of EU law" and thus falling within the fields covered by EU law"[59].

Therefore, it seems clear that, according to CJ's understanding, the "fields covered by EU law" [article 19.1(2) TEU] are more extensive or of a larger scope than those in which the same "applies". It should be remembered that, according to article 51 CFREU, the internal area of incidence of the right to judicial protection recognised in its article 47 has the scope "only" as far as EU law is applied[60].

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[58] Judgments of the CJEU: *ASJP, cit*., par. 29; *Commission/Poland* (C-619/18), *cit*., par. 50; *Commission/Poland* (C-192/18), *cit*., par. 101; *A.K. and Others, cit*., par. 82, or *Miasto Łowicz, cit.,* par. 33.

[59] Judgments of the CJEU: *ASJP, cit*., par. 40 (emphasis added); *A.K. and Others, cit*., par. 83, or *Miasto Łowicz, cit.,* par. 34.

[60] On this respect: M.J. GARCÍA-VALDECASAS, *El Tribunal de Justicia, centinela…*, *op. cit*., par. III.2); M. BONELLI and M. CLAES, *Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary*, in *European Constitutional Law Review*, 14, 2018, pp. 630 *et seq*.; L. PECH and S. PLATON, *Judicial Independence under threat: the Court of Justice to the rescue*, in *Common Market Law Review*, 55, 2018, n. 6, pp. 1827 *et seq*.; K. LENAERTS, *On Judicial Independence and the Quest for National, Supranational and Transnational Justice*, in G. SELVIK *et alii* (eds.), *The Art of Judicial Reasoning. Festschrift in Honour of Carl Baudenbacher*, Springer, 2019, p. 155; A. VON BOGDANDY and L. D. SPIEKER, *Contra los jueces que silencian las críticas…*, *op. cit*., par. II.2; A. TORRES PÉREZ, *From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence*, in *Maastricht Journal of European and Comparative Law*, 6, 2020, pp. 112 *et seq*.; N. CANZIAN, *Il principio europeo di indipendenza dei giudici: il caso polacco*, in *Quaderni costituzionali*, XL, 2020, n. 2, pp. 468-471; L. BADET, *À propos de l'article 19 du Traité sur l'Union Européenne…*, *op. cit*., especially pp. 70 *et seq.*; P. VAN ELSUWEGE and F. GREMMELPREZ (*Protecting the Rule of Law in the EU Legal Order…*, *op. cit*., pp. 25 *et seq*., for whom the Court designed in Judgment a broader scope of

On the other hand, it is obvious that the objective or structural dimension of effective judicial protection – as a core of the Rule of Law value and with the guarantee of judicial independence, as an essential requirement – is more marked in article 19 TEU than in article 47 CFREU[61]. In addition, it is also clear that the mentioned case-law is more based on that provision rather than this one (except Judgment *A.K. et alii*), although it is true that it tends to use both (even in Judgment *ASJP*, in which article 47 is barely mentioned). As Full Professor Paz Andrés points out, the CJ has opted, at least for the time being, for the use of the second subparagraph of article 19.1 TEU in combination with article 47 CFREU when protecting judicial independence as element of the Rule of Law[62]. In any case, the fact is that, as we will see afterwards, the CJ is using these articles as retaining wall of the national provisions regarding judicial organisation which are contrary to the said effective judicial protection recognised by EU law.

This Court has highlighted, and it does so in most part of the case-law on this matter, that "the organisation of justice in the Member States falls within the competence of those Member States, *the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law*, and in particular, from the second subparagraph of article 19 (1) TEU"[63]. If they are not complied or there is a national measure which contradicts them, it shall

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application of article 19.1 (2) TEU in the sense that such is applied to all areas covered by EU law, notwithstanding if the State Members are implementing EU law in the sense of Article 51 (1) CFREU, and which has to be fulfilled by all judges and courts that can be called upon to pronounce on matters concerning the application or interpretation of EU Law. Article 47 of the Charter is used as a tool to interpret article 19.1 (2) TEU, and provides useful information on the specific implementation of the principle of effective judicial protection, with the principle of independence of the judiciary as a crucial component.

[61] For better understanding, it is helpful the following information: while in this provision the subject of the sentence and the action is "*Member States*" [shall provide remedies sufficient to ensure *effective legal protection* in the fields covered by Union law], in article 47 this subject refers to the subjective dimension: "*Everyone* whose rights and freedoms guaranteed by the law of the Union are violated" [*has the right to an effective remedy before a tribunal*].

[62] P. ANDRÉS SÁENZ DE SANTA MARÍA, *Rule of Law and Judicial Independence…*, *op. cit.,* section 1.2 *in fine.* The CJ will rule case *A.K. and Others*, based on the decision of article 47, but from the connection of the article 19 (1) TEU. It will state specifically that "the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law which is now enshrined in Article 47 of the Charter, so that the former provision requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of the latter provision, in the fields covered by EU law" (*cit*., par. 168; *vid*., as well as par. 159).

[63] Judgments of the CJEU: *Commission/Poland* (C-619/18), *cit*., par. 52 (in which it is added, "by requiring the Member States thus to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, therefore, contrary to what is alleged by the Republic of Poland, arrogating that competence"); *Commission/Poland* (C-192/18), *cit*., par. 102; *Miasto Łowicz, cit.,* par. 36; or Order of the CJEU *Commission/Poland* (C-791/19 R), *cit*., par. 29.

A. VON BOGDANDY and L. D. SPIEKER, recall that the function of article 19.1.2 TEU is to guarantee that the multilevel judicial system of the EU, a reinforced decentralised judicial system based on the cooperation between CJEU and national judicial bodies, "works and that no protection gaps open within the EU legal space. This implies supranational standards regarding the national judiciary, its remedies and procedures" (*Countering the judicial silencing of critics…*, *op. cit*., II.2).

be reviewed, and EU law must come first. National measures on the organisation of the Administration of Justice are not application measures of EU law, since they answer a competence reserved by the States, but they fall within its scope should they concern the State (non)-compliance of EU law[64].

IV.2. Review cases. Origin and development of a case-law saga

The main idea of this work consists, as indicated at the beginning, in describing that the fundamental right to effective judicial protection recognized in European Union law is acting as the legal limit of national measures related to the administration of justice, enabling a judicial review (or control) of these measures. This phenomenon begins to become evident from the Judgment *ASJP* of the Court of Justice. Since this resolution the Court is using the objective or structural dimension of fundamental right to effective judicial protection, that is, the effective judicial protection understood as a core value of the Rule of Law (which includes judicial independence as an essential requirement), as a "systemic requirement, which could be used in abstracto to challenge national measures affecting the independence of judges"[65], by way of a "relevant parameter of review" to this effect[66] ("europeanness review"). This line of action will later be confirmed in a case law derived from this ASJP judgment.

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[64] Something similar occurs in other areas with State competence not conferred to the Union, as for instance, direct taxation, extradition of nationals of Member States to third countries or non-transferred competences on criminal proceedings. In this regard, the CJ refers to two interesting examples (in the same par. 52 of said Judgment *Commission/Poland*, C-619/18). Thus, it recalls that even if there is a lack of regulations in EU law that regulate the extradition of nationals of the Member States to Russia, Member States maintain the competence for the adoption of said rules and they are also obliged to exercise them in compliance with EU law, in particular the discrimination prohibition enshrined in article 18 TFEU, as well as free movement and residence within the territory of the Member States, guaranteed in article 21.1 TFEU (Court of Justice, Grand Chamber, Judgment of 13 November 2018, *Raugevicius*, C-247/17, par. 45). Additionally, it says that although Treaties have ascribed only limited powers to the Union in criminal matters, it is nonetheless apparent from the case-law of the Court that EU law sets certain limits to the powers of Member States in such matters, thus it must be exercised in line with not only the fundamental freedoms guaranteed by EU law but also EU law as a whole. Consequently, "the national rules of criminal procedure may not preclude the jurisdiction conferred on the Court by the second subparagraph of Article 14.2 of the Statute of the ESCB and of the ECB, wherever that provision is applicable" (Court of Justice, Grand Chamber, judgment of 26 February 2019, *Rimšēvičs and BCE/Letonia*, joined cases C-202/18 and C-238/18, par. 57).

[65] *Vid*. L. PECH and S. PLATON, *Judicial Independence under threat…*, *op. cit.,* pp. 9 *et seq.* (emphasis in the original).

[66] D. SARMIENTO, "On Constitutional Mode", Blog: *Despite our Differences*, dated 6 March 2018 (https://despiteourdifferencesblog.wordpress.com/2018/03/06/on-constitutional-mode/), where it affirms that "of all the principles enshrined in Article 19 TEU, the Court focused on independence, which, according to the Court, is not a principle only relevant for Union courts, but also for national courts. Article 19 TEU has thus been transformed into a crucial rule on the judiciary of the Union, understood in a federal sense, as a judiciary of the federation and its States. And the guarantor of the judiciary, the ultimate guarantor, is the Court of Justice. Quite a development indeed". See also, on this matter: P. ANDRÉS SÁENZ DE SANTA MARÍA, *Rule of Law and Judicial Independence…*, *op. cit.,* 1.2.1; M.J. GARCÍA-VALDECASAS, *El Tribunal de Justicia, centinela…*, *op. cit*., particularly section IV. It is interesting to add in this context the recent statement of Advocate General E. Tanchev in which says that

The effect of this case law is profound. It is not only or simply that the Court is reacting, as can be seen, to specific national acts that may dismantle judicial independence. It is also that, by reacting in this way, the Court has inaugurated and activated a control over a sensitive and specific state material sphere: that of measures related to the administration of justice. Let us look briefly at the main cases in which this European parameter of effective judicial protection comes into play, pointing out the national rules on the administration of justice concerned:

(a) In such Judgment *Associação Sindical dos Juízes Portugueses* (*ASJP*), dated 27 June 2018, it will be analysed in the end if a national measure (in this case, a Portuguese law), which had an impact on the remuneration system of the national judge by lowering it, affected the judicial independence recognised by EU law[67]. The Court concluded that the EU principle of judicial independence does not oppose to the application of general measures of remuneration reduction to members of the national Court since – linked to the imperative requirements of suppression of excessive budget deficit and to a EU financial assistance programme – they were applied to all members of the national public administration, not only to judges, and had only a temporary dimension. But, in any case, the fact is that this decision opens, somehow or other, a Europeanness/Community review on the respect for judicial independence, understood as a requirement for effective judicial protection of EU law connected to the value of Rule of Law. Eight months later and in the same sense, it will review again and rule another case (case *Escribano Vindel*) which contrasts judicial independence recognised by law with a national measure based on lowering remuneration[68].

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the CJ will admit "implicitly" the direct effect of article 19.1 in some of its Judgments as it will be seen next (Opinion delivered on 17 December 2020, in the case C-824/18, *A.B. and Others*, parr. 94 and 95). It was also noted by R. BUSTOS GISBERT by declaring that the Court raises judicial independence to principle with direct effect to be actionable by any citizenship or tribunal" in: *Sobre la independencia judicial (Notas al hilo del libro de Pablo Lucas Murillo de la Cueva, La independencia judicial y el gobierno de los jueces. Un debate constitucional)*, in *Teoría y Realidad Constitucional*, 44, 2019, p. 385.

[67] The case, which has been briefly described, arises from a preliminary ruling raised by the Portuguese Supreme Administrative Court which has the purpose of interpreting article 19.1(2) TEU and 47 CFREU. This preliminary ruling is raised in the framework of a proceedings between the mentioned Association, which acts in representation of the Members of the Court of Auditors, in relation with the reduction of the amount of remuneration – temporary – to the members of said body according to the guidelines of budgetary policy of the Portuguese State aimed to reduce the excessive budgetary deficit. Law 75/2014 reduced the amount of remuneration of a series of public offices and people who performed functions in the public sector, and ASJP contested before the Supreme Court its application acts to the members of the Court of Auditors, by mentioning that this implied the breach of the Portuguese Constitution and said articles of Union law, which was reflected in the raise of preliminary ruling. On this Judgment, among many others: L. PECH and S. PLATON, *Judicial Independence under threat…*, *op. cit.,* pp. 1827 *et seq*.; M. BONELLI and M. CLAES, *Judicial serendipity: How Portuguese judges…*, *op. cit*., pp. 622 *et seq*.; M.J. GARCÍA-VALDECASAS, *El Tribunal de Justicia, centinela de la independencia judicial…*, *op. cit.*; P. ANDRÉS SÁENZ DE SANTA MARÍA, *Rule of Law and judicial Independence…*, *op. cit.*, par. 1.2.1; A. TORRES PÉREZ, *From Portugal to Poland…*, *op. cit*., pp. 105 *et seq*.; M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial…*, *op. cit.,* pp. 11 *et seq*.; P. ZINONOS, *Judicial Independence & National Judges…*, *op. cit.,* pp. 615 *et seq*.

[68] Judgment dated 7 February 2019*, cit. supra*. A reference for a preliminary ruling raised by the High Court of Justice of Catalonia, in the framework of proceedings in which Magistrate Escribano Vindel contested a reduction of the remuneration amount by means of administrative acts adopted on the base of

(b) The next key judgment of this case-law saga is found in the said case *Minister for Justice and Equality*, dated 25 July 2018, which derives from a preliminary ruling raised by the High Court of Ireland, in relation with the execution of three European arrest warrants issued by the Polish court for the purposes of criminal prosecution. The preliminary ruling falls within the context of the recent and consecutive legislative reforms of the judicial system carried out in the Republic of Poland since 2015[69], for which combined effect, according to the raising court, the Rule of Law of said country had been breached[70] (measures carried out by the European Commission to submit in 2017 a reasoned proposal in which called upon the Council to declare, pursuant to article 7.1 TEU, the existence of a clear risk of serious breach of the Rule of Law by Poland).

On this base, the Court asked *a quo* to the CJ if the executing judicial authority of the European arrest warrant, which can lead to a breach of the fundamental right of the person sought to the principle of fair trial, according with judgment *Aranyosi and Căldăraru*[71], has the obligation, on the one hand, to ensure the existence of a real risk of breach of said fundamental right due to systemic deficiencies of the Polish judicial system and, on the other hand, to verify that said person is exposed to the risk of being surrendered to said country.

The answer of the Court of Justice emerges from the idea that the protection of independence of judicial authority is essential to guarantee the effective judicial protection of the litigants. On this base, and following the mentioned judgment, it understands that in the case that the person who is object of a European arrest warrant invokes, in order to oppose to his or her surrender, to the issuing judicial authority, the existence of systemic or generalised deficiencies, which may affect the issuing Member State's independency and its fundamental right to a fair trial guaranteed by article 47 CFREU (and the collected information by the European Commission in the reasoned proposal submitted to the Council according to article 7.1 TEU would be appropriate for these purposes), the executing judicial authority should also evaluate, based on

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article 31 of the General State Budget Law 2011 (*LGPE 2011)*. The contesting Tribunal asked, among other questions, if the national action generated a discrimination on the ground of age by the Charter (article 21) and by Directive 2000/78 (establishing a general framework for equal treatment in employment and occupation) and if it was contrary to judicial independence (that remains without prejudice to the fact that the Court had previously raised exceptions of unconstitutionality which was not admitted by the Spanish Constitutional Court), pursuant to the fact that the controversial provision did not breach, in particular, the principle of equality enshrined in article 14 of the Spanish Constitution).

[69] In particular, measures relative to the *Trybunał Konstytucyjny* (Polish Constitutional Court), to the *Sąd Najwyższy* (Polish Supreme Court), to the National Council of the Judiciary, to the organisation of the ordinary judicial bodies, to the National School for the Judiciary and the Public Prosecutor.

[70] On this matter, for example: M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial…*, *op. cit.,* pp. 14 *et seq*.; P. ZINONOS, *Judicial Independence & National Judges…*, *op. cit.,* pp. 618 *et seq*.; S. BERNAT and P. FILIPEK, *The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM*, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI and M. SCHMIDT (eds.), *Defending Checks and Balances in EU Member States*, Springer, 2021, pp. 404-430. In this same book: M. BONELLI, Intermezzo *in the Rule of Law Play: The Court of Justice's LM Case*, pp. 455-476.

[71] Court of Justice, Grand Chamber, judgment of 5 April 2016, joined cases 404/15 and C-659/15 PPU.

objective, reliable, precise and dully updated elements, if there exists a real risk of breach of this person's right in the issuing Member State, as a consequence of a lack of independency of the judicial bodies of said Member State, due to such deficiencies[72].

The presumption that the rest of the States respect fundamental rights – deriving from the mutual trust and recognition between Member States – can only be breached in very exceptional circumstances, under this double review stated in said Judgment (CJEU) *Aranyosi and Căldăraru*, concerning the breach of fundamental rights in the issuing Member State of the European arrest warrant and surrender. In that case, the review was advocated by questioning if the surrender could imply the breach consisting of the submission of the person to inhuman or degrading treatment prohibited by article 4 CFREU; and on this matter it does in reference with the risk of breaching the fundamental right to an independent judge and thus, of the essential contents of the fundamental right to a fair trial, guaranteed by article 47 of the Charter[73].

Regarding the contents of the present pages, one of the most interesting things of the judgments is that, as highlighted by María José García-Valdecasas, the same "gives value to the review which also corresponds to the States regarding the respect for effective judicial protection as part of the Rule of Law", by taking into consideration that "this time the reviewer is not the Court of Justice, but the judicial bodies of the Member States, which review in a horizontal manner"[74].

(c) The third key judgment on this subject derives from an action brought by the European Commission against the Republic of Poland: this is Judgment *Commission/Poland*, dated 24 June 2019 (C-619/18), on the independence of the Supreme Court which, as can be observed, was obtained just one year after Judgment *ASJP*. In this case, the national measures that promote the review of certain provisions of the new *Law on the Supreme Court* (and its consecutive amendments) which entered into force on 3 April 2018. The action upheld by the Commission requests that, by means of these provisions, the Supreme Court declares that the Republic of Poland has failed to fulfil its obligations enshrined in article 19.1 (2) TEU, in relation with the article 47 CFREU. Such failure is generated, first, by lowering the retirement age of the judges appointed to the Sąd Najwyższy (Supreme Court, Poland) and by applying that measure to the judges in post appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age[75].

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[72] Judgment *Minister for Justice and Equality, cit*., parr. 60-61.

[73] Judgment *Minister for Justice and Equality, cit*., par. 59. As stated by Advocate General M. CAMPOS SÁNCHEZ-BORDONA, the importance of this judgment resides probably "in its argumentative *iter* on judicial independence. This factor performs a prominent role in the mechanism of European arrest warrants, a criminal cooperation modality among judicial authorities which has as assumptions the principles of mutual trust and mutual recognition between Member States. These are principles that, in turn, can spread out its potential if the issuing and receiving judicial authorities have this independence note in common" (*La protección de la independencia judicial*…, *op. cit.*, p. 16).

[74] "The Court of Justice, sentry…", *op. cit*., section IV.

[75] See parr. 1, 25 and 26 of the Judgment.

Additionally, at the same time and by a separate document, the Commission submitted an action for interim measures (articles 279 TEU and 160.2 *Rules of Procedure of the Court of Justice*) requesting, while awaiting the judgment that would resolve the main issue, the suspension of the application of said provisions, and the adoption of all necessary measures in order that the judges could continue the performance of their functions in the same positions, without the possibility of taking measures to be replaced. By means of the Order 19 October 2018[76], only two weeks after, the Vice-President of the Court provisionally granted the request for interim measures until the adoption of the Order terminating the precautionary proceedings, a second Order that was adopted by the Grand Chamber on 17 December 2018, accepting the precautionary measures requested by the Commission[77].

Once confirmed that the Supreme Court is a national judicial body which [to the extent that can be implied on resolving on matters linked to the application or interpretation of EU law, and that is part of the Polish system of remedies «in the fields covered by EU law» in the sense of article 19.1 (2) TEU] is subject to the requirements of effective judicial protection[78], among which there is the respect for judicial independence, the CJ analyses if the controversial national provisions are contrary or not thereto. In this sense, it will conclude that the measure of lowering the retirement age of the judges in post "results in those judges prematurely ceasing to carry out their judicial office and is therefore such as to raise reasonable concerns as regards compliance with the principle of the irremovability of judges"[79]. Likewise, on the other hand, it understands that the measure of granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age can also diminish judicial independence. And this since "its adoption is not, as such, governed by any objective and verifiable criterion and for which reasons need not be stated. In addition, any such decision cannot be challenged in court proceedings"[80].

Among the numerous reflexions generated by the Judgment, and in relation with our subject of study, it is particularly interesting to bring up two considerations highlighted by Advocate General of CJ Manuel Campos Sánchez-Bordona[81]: on the one hand, the emphasis put by the Court of Justice on the perception or impression received

[76] Order of the Vice-President CJEU *Commission/Poland*, C-619/18 R (not published).
[77] Order of the CJEU *Commission/Poland*, C-619/78 R.
[78] Paragraph 56 of Judgment *Commission/Poland*, C-619/18 (reference is made to the Order of CJEU 17 December 2018, *Commission/Poland, cit.,* par. 43).
[79] Judgment *Commission/Poland*, C-619/18, par. 78. A measure whose "application is acceptable only 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" (*Ibid*., par. 79).
[80] Judgment *Commission/Poland*, C-619/18, par. 114.
[81] M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial…, op. cit.*, pp. 20-21. Also M. SCHMIDT and P. BOGDANOWICZ, *Ascertaining the 'Guarantee of Guarantees': Recent Developments Regarding the Infringement Procedure in the EU's Rule of Law Crisis*, in A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, C. GRABENWARTER, M. TABOROWSKI and M. SCHMIDT (eds.), *Defending Checks and Balances in EU Member States*, Berlin, 2021, pp. 210 *et seq.*

by litigants regarding judicial independence, by noting the need of exclusion of any legitimate doubts in them in respect with the impermeability of the judicial bodies before external elements and regarding their neutrality in relation with the conflicting interests[82]. On the other hand, from the perspective of judicial independence and in a cautious manner, the judgment also covers the delicate matter of appointment of judges, including the intervention of bodies such as Councils for the Judiciary, and culminates theses (such as the requirement to the Council for the Judiciary of said Republic to be "independent of the legislative and executive authorities")[83] which would cause reticence in certain Member States.

(d) Only four months and a half after the previous resolution, the CJ rules a new proceeding based on failure: Judgment *Commission/Poland* (C-192/18), 5 November 2019, relative, in this case, to the independence of ordinary courts. This is also an important and significant resolution in this group of decisions of the CJ that shows the existence of Europeanness review on national measures relative to the Administration of Justice for the respect for effective judicial protection and judicial independence within the fields covered by EU law.

In this case, the review activated by the Commission and decided by CJ will be so on the Law, amending Law on the Ordinary Courts Organisation and other laws, dated 12 July 2017, due to the failure of two types of obligations. On the one hand, those which concern said Member State pursuant to article 157 TFEU (principle of equal pay for male and female workers for equal work or work of equal value) and Directive 2006/54/EC (on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation) since this Law establishes different retirement ages for men and women holding the position of judge of the ordinary courts or that of public prosecutor. And, on the other hand, for failing to fulfil the obligations "that fall within it under the provisions of the second subparagraph of Article (19) 1 TEU", when granting the Minister for Justice, by means of said Law, the power to authorise or deny the extension of the period of active service as judges of the ordinary courts, once the new retirement age (which was lowered by the same Law) has been reached.

Europeanness review on the discriminatory national measures is not a new review, but instead, what is new is the review on internal provisions on the judicial organisation which are not respectful with effective judicial protection, and with this Judgment another step is taken to reaffirm this control or review.

(e) Judgment *A.K. and Others,* dated 19 November 2019[84], is the next ruling of the case-law saga which we have been describing, the fifth important judgment which was

[82] Cfr. Judgment *Commission/Poland*, C-619/18, par. 74.

[83] Judgment *Commission/Poland*, C-619/18, par. 116. The Court will insist again on consecutive resolutions on the need that "in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive" (Judgment *A.K. and Others, cit*., parr. 124 and 125; Order of the CJEU 791/19 R, *cit*., parr. 66 to 68).

[84] Joined cases C-585/18, 624/18, 625/18, already quoted.

ruled less than a year and a half after said *ASJP* which led thereto, in this case it was relative to the independence of the Disciplinary Chamber of the Supreme Court of the Republic of Poland (it is the fourth judgment on lack of judicial independence of this country). The resolution answers three requests for a preliminary ruling[85], raised by the Labour Chamber of the Polish Supreme Court, which aroused from significant proceedings between, on the one hand, the judge of the Supreme Administrative Court of Poland and the National Council for the Judiciary (NCJ) of this country; and, on the other hand, CP and DO, judges of the Polish Supreme Court and this last Court. These are proceedings that emerge in relation with the forced early retirement of judges and, more specifically, with the independence of the new Disciplinary Chamber of the Supreme Court. This Chamber was established under the new Law on the Supreme Court, which is composed of new members appointed under a proposal of the NCJ, and has exclusive jurisdiction on matters of forced retirement of the judges of the Supreme Court[86].

CJ will declare that the right to effective judicial protection (enshrined in article 47 CFREU) opposes to the fact that some proceedings on the application of EU law can fall within the exclusive jurisdiction of a body which does not constitute an independent and impartial Court and suggests to the referring body these can be the circumstances of said matter[87]. In this sense, the Court notes that it is the national Court which decides whether a case corresponds to the Disciplinary Chamber of the Supreme Court or not, by considering the relevant information available to it[88]. And, should that be the case, it would be obliged – according to the principle of precedence – to leave unapplied the provision of the national law which reserves the power of hearing main proceedings to this body[89].

The fact of the Disciplinary system of the Supreme Court still causes debate for other CJ rulings. Among them, at the moment, Judgment *Miasto Łowicz* (GS) dated 26

[85] Focused on the interpretation of articles 2 and 19.1 (2) TEU, article 267 (3) TFEU, article 47 CFREU and article 9.1 of Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (article regarding effective judicial protection within the scope of application of the Directive).

[86] The recent Law, modifying the Law on the National Council for the Judiciary and other laws, dated 8 December 2017, will modify, likewise, the system of appointment members of said NCJ (fifteen will be appointed by the *Sejm*, the lower house of the Polish Parliament, and not by their counterparts, as before), which plays a crucial role on the appointment of members of the Disciplinary Chamber.

[87] To this respect, for example, M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial…*, *op. cit.*, p. 23. On ECHR case-law on this matter, among others: P. ANDRÉS SÁENZ DE SANTA MARÍA, *Rule of Law and judicial Independence…*, *op. cit.*, par. 2; J.M. CORTÉS MARTÍN, *Sorteando los inconvenientes del artículo 7 TUE…*, *op. cit.*, pp. 495 *et seq*.

[88] Paragraph 171 of the Judgment; see also, parr. 153 and 154.

[89] *Ibidem*, parr. 155 *et seq*., especially par. 171. On the judgment, among others: P. ANDRÉS SÁENZ DE SANTA MARÍA, *Rule of Law and judicial Independence…*, *op. cit.*, par. 1.2.3; M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial…*, *op. cit.*, pp. 22 *et seq*.; M. KRAJEWSKI and M. ZIÓLKOWSKI, *EU judicial independence decentralized: A.K.*, in *Common Market Law Review*, 57, 4, 2020, pp. 1107 *et seq*.

March 2020[90], in the main, when raising the question of compliance of the new Polish regulations regarding the system of disciplinary proceedings against judges with the litigants' rights to effective judicial protection, enshrined in article 19.1 (2) TEU. And likewise, reference is also made to Order of the CJEU *Commission/Poland* (C-791/19 R), dated 8 April 2020[91], adopted by the Grand Chamber, for which, in line with the request of interim measures by the European Commission on 23 January 2020, the Court orders Poland to suspend immediately the application of the national provisions regarding the powers of the Disciplinary Chamber of the Supreme Court with regard to the disciplinary cases related to judges. It can be observed how the Court uses once again the interim measures of article 279 TFEU as Europeanness review mechanism of the national measures. The request and resolution of interim measures are located in the framework of another proceedings of failure against Poland, which has not been solved yet, brought by the Commission on 25 October 2019, in this case, in short, on the fact that said new disciplinary system, established in Poland since 2017 measures, would be contrary to Union Law, due to the failure of this State to fulfil its obligations in virtue of article 19.1 (2) TEU[92]. Said interim claims of the Commission complied with the fact that such disciplinary continued operating despite what had been noted on it in such Judgment *A.K. and Others*, ruled in November of the same year. The Court understood that the application of these controversial national provisions, to the extent that they assign jurisdiction to hear about disciplinary proceedings of the judges of the Supreme Court and of the ordinary courts to a body, as the Disciplinary Chamber, whose independence could be guaranteed or not, can cause a serious and irreparable damage to EU law[93].

As a matter of fact, it should be noted that this is not an isolated phenomenon and it is not reduced to the Republic of Poland. From the development of such case-law saga, a lot of preliminary ruling procedures have started to proliferate in various Member States, also in relation with effective judicial protection and judicial independence. Advocate General Manuel Campos Sánchez-Bordona indicates, in this sense, that "the «discovery» of independence as quality of the judicial bodies which can be for the consideration of the Court of Justice is giving rise to an increase of references for preliminary rulings which put into question national regulations of their judicial institutions"[94]. Therefore, apart from those which have still been referred from Poland[95],

[90] Joined cases C-558/18 and 563/18, previously quoted. On this matter, among others: L. D. SPIEKER, *The Court gives with one hand and takes away with the other: The CJEU's judgment in Miasto Łowicz,* in *VerfBlog,* de 2020/3/26, https://verfassungsblog.de/the-court-gives-with-one-hand-and-takes-away-with-the-other/

[91] C-791/19 R, previously quoted.

[92] See, in this respect, par. 3 of said Order of CJEU.

[93] *Ibidem*, parr. 91-93. To analyse the Order of the CJEU: L. PECH, *Protecting Polish Judges from the Ruling Party's 'Star Chamber': The Court of Justice's interim relief order in Commission v Poland (Case C-791/19 R)*, in *Verfassungsblog*, 9 April 2020, https://verfassungsblog.de/protecting-polish-judges-from-the-ruling-partys-star-chamber/

[94] *La protección de la independencia judicial…*, *op. cit.*, p. 26. Véase también M.J. GARCÍA-VALDECASAS, *El Tribunal de Justicia, centinela…*, *op. cit.*, par. IV.

there are others submitted, in the same line, by the courts of other States such as: Hungary[96]; Romania[97]; Germany[98]; or the one referred by the Constitutional Court of Malta to the CJ[99].

IV.3. A note on review mechanisms or channels

The exposed case-law of this article enables to confirm that the main channels or mechanisms which are used to review national measures opposed to effective judicial protection enshrined in arts. 19.1 (2) TEU and 47 CFREU are the reference for preliminary ruling and actions for failure. It is not the time now to examine in depth the possibilities and limitations which present both mechanisms regarding our study area. Nevertheless, it is interesting to note briefly various considerations on this respect:

(i) Firstly, the mission of the Court of Justice, as it has reminded, "must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations". In the preliminary ruling (of interpretation) its task is "to help the referring court to resolve the specific dispute pending before that

[95] For example, the reference for preliminary ruling by the Polish Supreme Court: 3 July 2019 (*Prokurator Generaly*, C-508/19) and 20 September 2019 (*W.Z.*, C-487/19). It should also be noted the recent Judgment of the Court of Justice (Grand Chamber) of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, case C-824/18, a judgment in which the Court maintains that successive amendments to the Polish Law on the National Council of the Judiciary which have the effect of removing effective judicial review of that council's decisions proposing to the President of the Republic candidates for the office of judge at the Supreme Court are liable to infringe EU law. The Court adds in this regard that, when an infringement like that has been proven, the principle of primacy of EU law requires the national court to disapply such amendments.

[96] Referred on 24 July 2019, in which, in the framework of a criminal proceedings, the referring Court asks if the principle of judicial independence referred to in the second subparagraph of Article 19(1) TEU, Article 47 CFREU and the case-law of the Court of Justice of the European Union must be interpreted as meaning that "that principle is breached where the president of the National Office of the Judiciary, who is responsible for the central administration of the courts and who is appointed by the parliament, the only body to which he or she is accountable and which may remove him or her from office, fills the post of president of a court — a president who, *inter alia*, has powers in relation to organisation of the allocation of cases, commencement of disciplinary procedures against judges, and assessment of judges — by means of a direct temporary nomination, circumventing the applications procedure and constantly disregarding the opinion of the competent self-governance bodies of judges" (*IS*, C-564/19).

[97] See, in this sense, Opinion of Advocate General Bobek, delivered on 23 September 2020, in the Joined cases (which arise from various references for preliminary rulings by the Romanian Courts): C-83/19 Asociaţia «Forumul Judecătorilor Din România»/Inspecţia Judiciară, C-127/19 Asociaţia «Forumul Judecătorilor Din România» and Asociaţia Mişcarea Pentru Apărarea Statutului Procurorilor/Consiliul Superior al Magistraturii, and C-195/19 PJ/QK, and in cases C-291/19 SO/TP *et alii*, C-355/19 Asociaţia «Forumul Judecătorilor din România» and Asociaţia «Mişcarea Pentru Apărarea Statutului Procurorilor» and OL/Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie - Procurorul General al României and C-397/19 AX/Statul Român - Ministerul Finanţelor Publice.

[98] For instance, the reference for preliminary ruling submitted by the Administrative Court of Wiesbaden, dated 1 April 2019, with a judgment of the Court of Justice of 9 July 2020, *VQ and Land Hessen*, C-272/19; or the reference made by the Regional Court for civil and criminal cases on 24 June 2020 (*B*, C-276/20).

[99] On 5 December 2019, case *Repubblika/Il-prim Ministru*, C-896/19. See in this respect the Opinion of Advocate General G. Hogan, delivered on 17 December 2020.

court"[100]. But in a lot of occasions, as in this case, this mechanism turns into a tool for review of effectiveness or applicability of Union law (with regard to references for preliminary rulings of the national judge)[101]. It is known that the Luxembourg Court cannot carry out a review on the legality of national action; but it is also known that the Court uses the reference for preliminary ruling as (indirect) proceedings to review the regulatory activity of the Member States, but *when it indicates (or implies) that Union law which is asked to interpret "opposes" to said national measure.*

For its part, in an action for failure to fulfil obligations, the function of the Court of Justice consists in verifying "whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts"[102]. This is an abstract review on the fulfilment or failure of Union law (of the obligations deriving from it), not a review on its applicability or effectiveness. All this notwithstanding that the declaration of incompatibility can lead to coercive penalties and/or sanctions if not promptly corrected. In any case, the case-law studied in this article enables to observe that the action for failure to fulfil obligations is an effective tool as a mechanism to review any action or national measure which is opposed to effective judicial protection enshrined in articles 19.1 (2) TEU and 47 CFREU and its deriving requirements, as judicial independence[103].

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[100] Judgment *Miasto Łowicz, cit. par.* 47. On this respect, see also: P. ANDRÉS SÁENZ DE SANTA MARÍA, *Rule of Law and Judicial Independence*…, *op. cit.,* section 1.2.3; M. CAMPOS SÁNCHEZ-BORDONA, *La protección de la independencia judicial*…, *op. cit*., pp. 24-25.

[101] It is true that the mechanism of article 267 TFEU does not empower the Court to apply rules of EU law to a particular case, but only to rule on the interpretation of the Treaties and of acts adopted by EU institutions, it is also true that, according to case-law, "the Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions" (paragraph 132 Judgment *A.K. and Others, cit.*). And in this line, in the light of the primacy principle, "where it is impossible for it to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means" (*ibidem*, par. 160).

[102] Judgment *Miasto Łowicz, cit., par.* 47.

[103] Also, as highlighted by M.J. GARCÍA-VALDECASAS (*El Tribunal de Justicia, centinela*…, *op. cit*., par. IV), it is a channel which, among other things, makes possible to overcome the problems presented by the application of the coercive mechanism of article 7 TEU (reference will be made soon) providing to the Commission a "quicker" path than this one in order to solve problems on Rule of Law regarding judicial independence. See also, on this matter: J.M. CORTÉS MARTÍN, *Sorteando los inconvenientes del artículo 7 TUE…*, *op. cit.,* pp. 479 *et seq*.; A. KRZYWON, *La defensa y el desarrollo del principio de independencia judicial en la Unión Europea*, in *Revista Española de Derecho Constitucional*, 119, 2020, especially pp. 89 *et seq.*; J. TEYSSEDRE, *La judiciarisation du contrôle du respect de l'état de droit, et seq.*; U. VILLANI, *Sul controllo dello Stato di diritto nell'Unione Europea*, in *Freedom, Security & Justice: European Legal Studies*, 1, 2020, pp. 16 *et seq*.; K.L. SCHEPPELE, D.V. KOCHENOV and B. GRABOWSKA-MOROZ, *EU Values are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, in *Yearbook of European Law*, 38, 2020, pp. 42 *et seq*.

(ii) As second consideration, it is very interesting to do not lose sight of the fact that what is striking regarding said Europeanness review, either if it is activated by national judges – reference for preliminary ruling – or by the Commission or the rest Member States – action for failure – does not reside only in the fact that the review parameter or standard is marked by EU law (in our case, effective judicial protection as recognised in EU law), but also that this review is decided by a supranational judicial body: the Court of Justice. This Court is operating, in respect with the matter of this article, in the line of a federal constitutional court, in the sense that acts as a safeguard of the Rule of Law in EU law[104].

(iii) Finally, likewise, it should be noted that there are still two other interesting review mechanisms or tools, beyond the leading role of the preliminary ruling and the action for failure, that can also be used to review national measures contrary to effective judicial protection enshrined in European Union law.

There are, on the one hand, the interim measures of article 279 TFEU, to which the Court is giving, as observed, a significant role in the review of such Polish national measures[105]. On the other hand, we found ourselves with the coercive channel (for extreme situations) of article 7 TEU[106]. As already known, said article sets up two mechanisms, both aimed to coercive protection of the values recognised in article 2 TEU, including the Rule of Law. One mechanism is preventive, in case of existence of a clear risk of serious breach by the Member State, and the other one is sanctioning, when a serious and persistent breach is confirmed. The review consequences vary in each case. But this is not a legality review, but a review of nature and political effects, in case of systemic risks concerning the breach of the mentioned values. And where the review protagonists are actors that are not internal or national, but supranational (European Commission, European Parliament, European Council) bodies and also non-jurisdictional bodies.

This mechanism has already been activated – in its preventive arms – by the Commission against Poland (2017), since it generated a clear risk of breach of the Rule of Law[107]; and the European Parliament implemented it in relation with Hungary

[104] Cfr. P. VAN ELSUWEGE and F. GREMMELPREZ, *Protecting the Rule of Law in the EU Legal Order*…, *op. cit*., p. 10. Said authors observe a tendency in Court case-law in which article 2 TEU is used, in combination with Article 19 TEU, as a crucial point of reference to strengthen their constitutional role.

[105] On the use of the proceedings of interim measures as tool to guarantee the respect for the Rule of Law: P. VAN ELSUWEGE and F. GREMMELPREZ, *Protecting the Rule of Law in the EU Legal Order*…, *op. cit*., pp. 20-22; P. MORI, *La questione del rispetto dello Stato di diritto in Polonia e in Ungheria: recenti sviluppi*, in *Federalismi.it*, 1 April 2020, especially par. 4.

[106] For the analysis of other tools or channels that help also, in one way or another, in the defence and promotion of judicial independence, the effective judicial protection and Rule of Law: R. BUSTOS GISBERT, *Comunicación transjudicial en Europa*…, *op. cit*.

[107] Once raised a series of recommendations on the independence of the Judiciary [Recommendation (EU) 2016/1374 dated 27 July 2016, Recommendation (EU) 2017/146 dated 21 December 2016, Recommendation (EU) 2017/1520 dated 26 July 2017 and Recommendation (EU) 2018/103 dated 20 December 2017], the Commission presented on 20 December 2017 the *Proposal* [funded according to article 7.1 TEU concerning the Rule of Law in Poland] *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*: [2017] [COM(2017) 835 final].

(2018), due to the clear risk of serious breach of the Union values[108]. Nevertheless, to be honest, it should be pointed out that this mechanism is showing serious problems or limitations with respect to its application. And these problems lead us to the conclusion that, as stated by Professor Dimitry Kochenov, the aim of this article seems to lie in pushing the Member States where the breach could occur to engage in dialogue with EU institutions in order to prevent possible breaches[109].

V. Conclusions

To the extent that the national Judge is also Judge of the European Union, Union law should ensure that its jurisdictional function – consisting also in guaranteeing the full application of EU law – can be developed according to the requirements of the fundamental right to judicial protection and to the Rule of Law value recognised in the Union [article 19.1(2) TEU, article 47 Charter FREU and article 2 TEU]. Based on CJ case-law, one can deduce that the respect for judicial independence – according to European standards – is a crucial requirement in this sense. For a number of years now, the Court is recognising and strengthening the existence of this objective or structural dimension of the effective judicial protection recognised in the EU. It does not limit itself to ensure the existence of a subjective right to judicial protection, but also it protects as well its systemic or constitutional dimension without which Rule of Law would not exist. National law which is contrary to it and to its requirements, including the regulation relative to the Administration of Justice, cannot be operational or effective in the Union.

Nevertheless, this defence of the systemic or structural dimension of judicial protection, which is, in a way, a reaction to the process of "Rule of Law backsliding" which is occurring in some countries of the Union[110], does not have only as its aim the protection of Rule of Law. The Court also slips, and not infrequently, among its

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[108] *European Parliament Resolution, of 12 September 2018, on the proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* [2017/2131(INL)].

[109] D. KOCHENOV, *Article 7: A Commentary on a Much Talked-About 'Dead' Provision*, in A. VON BOGDANDY, *et alii*, *Defending Checks and Balances in EU Member States*, cit., pp. 127-154; on the problems of this mechanism, too: K.L. SCHEPPELE, D.V. KOCHENOV and B. GRABOWSKA-MOROZ, *EU Values are Law, after All…, cit.,* pp. 37 *et. seq.*

[110] A "process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party" (L. PECH and K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, *Cambridge Yearbook of European Legal Studies,* 19, 2017, pp. 3 *et. seq.,* especially 10 *et. seq.*; on this subject, also, among others: J. MARTÍN Y PÉREZ DE NANCLARES, *La Unión Europea como comunidad de valores: a vueltas con crisis de la Democracia y del Estado de Derecho*, in *Teoría y Realidad Constitucional*, 43, 2019, pp. 121 *et. seq.*; D. KOCHENOV, *The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU*, in *University of Groningen Faculty of Law Research Paper Series*, 5, 2019; V. FAGGIANI, *La "rule of law backsliding" como categoría interpretativa del declive del constitucionalismo en la UE*, in *Revista Española de Derecho Europeo*, 71, 2019, pp. 57 *et seq*.).

arguments, on the significance of all this, in turn, on the protection of the effectiveness of Union Law and in the respect for the other values and objectives of the Union, as well as for the existence of a common space, without borders, based in this community of values and rights. In other words, in this "match", there is not only at stake the existence of Rule of Law in the Union and its Member States, but also, the project of the Union.

The CJ has recognised effect to this objective and structural dimension of judicial protection before the national regulations relative to the Administration of Justice opposed to it, although this is a matter with exclusive state-level competence. And it has done so on the basis of the parameter or standard of judicial protection of the Union (not the one derived from articles 24 or 117 of the Spanish Constitution, or from the respective constitutional provisions of the rest of Member States). In addition, the mechanisms through which europeanness review is mainly being carried out before these national measures, which are occasionally contrary, are the reference for preliminary ruling and the action for failure. National judges play an essential role in the former and the Commission (and the other Member States) in the latter. But the CJ, which is a supranational institution, is the one that has deciding weight. There is no doubt that the European conception of Rule of Law has been incorporated to the configuration of the national Administration of Justice.

ABSTRACT: The recognition of effective judicial protection under European Union law affects national regulations on the administration of justice. There is no doubt that the competence to regulate and act upon matters relating to the organisation and functioning of the national judiciary is an exclusive national competence, not conferred to the Union by the Member States. However, over the last couple of years, the Court of Justice has been implying that national measures concerning the national administration of justice cannot be contrary to the regulations on judicial protection as recognised by the Union. This European regulation works as a limit to those national measures related to the administration of justice, opening the door to a judicial review (or control) of these measures; a judicial control that uses European Union law (that relating to effective judicial protection) as a parameter or measure of judgment (review or control of "europeanness"). These pages discuss on which legal bases, in which cases and with which mechanisms this review is taking place.

KEYWORDS: Effective judicial (legal) protection – right to an effective remedy – rule of law – judicial independence.